Supreme Court, U.S.
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No.

In The

Supreme Court Of The United States

Vincent Gillespie,
Petitioner,

v.

Peggy Roggenbuck Gillespie,
Respondent

On Petition For Writ Of Certiorari
To The Massachusetts Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Vincent Gillespie
Petitioner In Pro Per
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I) Questions presented:

1) The Probate Court granted summary judgment in favor of the executrix and against the petition to have her removed. Did the court err in granting summary judgment?

2) Is Peggy Roggenbuck Gillespie ("Peggy"), the executrix of Gregory Gillespie's estate, unsuitable for her role as executrix?

3) Does the petitioner ("Vincent") have standing to petition the court for the removal of the executrix?

1) Is the will of Gregory Gillespie ("Greg"), and/or the trust created by it, charitable in nature?

2) Did the Probate Court err in denying the motion for reconsideration of the order granting summary judgment in favor of the executrix?

3) Vincent filed a separate action in the Superior Court, a complaint against Peggy. Does the Superior Court case give Vincent standing to petition for the removal of the executrix?

4) Did the Probate Court err in refusing to provide a report of material facts regarding its denial of the motion for reconsideration of its order granting summary judgment in favor of the executrix?

5) Have Vincent's rights under the U.S. Constitution, 14th Amendment (or other parts of the Constitution) been violated by the Probate Court's refusal to provide a report of material facts and the refusal of the probate and appeals courts to acknowledge the significance of the Superior Court case?

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[1] **ABBREVIATIONS KEY:**

"M.G.L." stands for Massachusetts General Laws.

Appendices attached to this brief: Appendix C, p. 43 = "Ap.C-43."

Pleadings presented to the Mass. Court of Appeals ("MCA"): Record Appendix, volume 2, pp. 633-634 = "A2-633-634"; Record Appendix, volume 1, pp. 22-25 = "A1-22-25"; Appellant's Opening Brief, p. 5 = "MCA.Op.Br-5"; Appellee's (Peggy's) Brief, p. 7 = "MCA.Peggy.Br-7"; Appellant's Reply Brief, p. 88 = "MCA.Reply.Br-88"; Transcript Record, pp. 55-56 = "MCA.Tr-55-56"; Impounded Appendix, p. 9 = "MCA.I-9."

Application for Further Appellate Review to the Mass. Supreme Court: "MSC.FAR-16" (That would mean p. 16 of that document.)

III) Table of Authorities:

15 Am.Jur.2d. § 6	16-17
15 Am.Jur.2d. § 8, 11, 50, 118, 119, 130	17
Attorney General for the Norfolk District v. David Magraw, 417 Mass. 169 (1994).	20, 21, 23, 24
Attorney General v. Bailey, 386 Mass. 367 (1982).	30
Graham v. Quincy Food Service Employees Association and Hospital Library and Public Employees Union, 407 Mass. 601 (1990).	30
Harrison v. Boston Financial Data Services, Inc.,37 Mass. App. Ct. 133 (1994).	30
Hub Associates, Inc. v. Goode, 357 Mass. 449 (1970).	30
Kapialani Park Preservation Society v. Honolulu, 751 P.2d 1022 (1988).	11, 14
Quincy Trust Company v. Taylor, 317 Mass. 195 (1944).	21

IV) Opinions entered in this case by the lower courts:

The Probate Court's Order and Memorandum of Order On Motion For Summary Judgment, dated 6/24/04 ("Judge Wilson's Memorandum"): See Ap.A-33.[2]

The Mass. Appeals Court's Memorandum and Order, dated 8/14/06: See Ap.B-63.

V) Jurisdiction:

On 11/2/06 the Massachusetts Supreme Judicial Court denied the Petitioner's Application For Further Appellate Review. (Ap.C-71.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

VI) Laws and statutes involved in the case:

M.G.L. chapter 230 § 5 (Ap.I-98)	21
M.G.L. chapter 215 § 11 (Ap.J-99)	23, 24
M.G.L. chapter 68 § 18 (Ap.K-100)	14
Mass. Constitution, Part 1, Article XI (Ap.L-101)	25
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Mass. Rules of Civ. P., Rule 60(b) (Ap.O-104)	4
Probate Court Standing Order 2-99	4

VII) Statement of the case:

A) General Background Information:

Gregory Gillespie ("Greg") was a renowned and extraordinary artist. His estate is currently represented by the Salander-O'Reilly Gallery, a prestigious art gallery in New York City. Some of his paintings are in the Metropolitan Museum in NYC, the Hirshhorn Museum in Washington D.C., the Whitney Museum in NYC, the Museum Of Fine Arts in Boston and many other fine museums around the country. His work has been shown in numerous one man and group shows around the country and in Europe and Japan, and it has been written up in numerous publications (A1-177-

[2] See the Abbreviations Key in footnote #1 on p. iii.

181). (To see some images of his work enter "Gregory Gillespie" into the images function of Google.) Adam Weinberg, Director of the Whitney Museum,[3] and Malcolm Rogers, Director of the Museum Of Fine Arts in Boston, have provided letters (as part of an earlier motion) praising Greg's work and expressing the importance of having it on public display and available to the public for viewing (see: Ap.F-90, Ap.G-92; A2-718-724).

Greg died on April 27, 2000 by suicide at age 63. His widow is Peggy Roggenbuck Gillespie ("Peggy"). There are two children from a previous marriage of Greg's (to Frances Cohen Gillespie), Vincent Gillespie ("Vincent") and Lydia Gillespie ("Lydia") (ages 45 and 43, respectively), and there is a younger daughter, Julianna Gillespie, a.k.a. Jay ("Jay") (age about 19), who was adopted by Peggy and Greg.

When Greg died he left about 420 paintings, which comprised the great majority of his estate. Roughly 390 paintings remain in the estate at this time. Peggy is the executrix of Greg's estate, as specified by the will.

B) Background Information Regarding The Will:

The will states that an art expert should be hired to evaluate every single painting in the estate and categorize each one as either "non-major," or "major." "Major" works are defined as "...those of extraordinary quality or museum caliber quality." (Ap.E-78; A1-17) The will specified that Lydia and Vincent were to choose five non-major paintings each prior to any other distributions being made. The rest of the estate, basically, was to go into a trust, the Gregory Gillespie Revocable Trust, which had Peggy as one of the trustees. The proceeds from the sales of paintings by the trust go to Peggy and Jay and, under certain contingencies, to several specified charities. (MCA.I-54-55.)

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[3] The Whitney Museum is one of the most prestigious museums in the world for contemporary American Art. See Adam Weinberg's letter, Ap.F-90. (A2-723.)

Article Ninth of the will specified that it was *Greg's primary intention* that the paintings should be sold in a program of sales designed to *maximize the viewing audience of the paintings after their sales* (which for practical purposes means placing them in museums). (See: Ap.E-83-84; A1-24-25.) Virtually identical language is repeated in the trust. (MCA.I-63-64.)

C) Procedural History:

The will was submitted for probate on 5/24/2000 and allowed by the court on 7/13/2000.[4]

Pursuant to the will, the estate hired an art expert, Dr. Carl Belz, to categorize each painting in the estate as either "major" or "non-major." On 3/5/01, under pressure from Peggy's attorney, Vincent selected five choices for paintings but he explicitly stated that he was doing so under protest. (A1-368.)

By 2002 Vincent had become aware of substantial improprieties in Peggy's conduct and management of the estate. On 8/30/02 Vincent filed a petition for inventory and account (no inventory and accounting had been filed up to that point). (A1-33; A1-10.) In October of 2002 he finally moved from California, where he had resided (for the most part) for about 20 years, to Massachusetts, and began personally and extensively investigating these improprieties.[5]

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[4] Attorney Tom Lesser, who was representing Lydia and Vincent regarding their mother's (not Peggy) estate, filed an appearance on behalf of Vincent and Lydia regarding their father Gregory Gillespie's estate. Attorney Lesser stated in writing that Vincent and Lydia had no objection to the will. However, he later provided an affidavit acknowledging that there had been a misunderstanding and that Vincent had not authorized any such statement nor appearance. (A2-842.)

[5] Vincent did not initially object to the will because he simply did not know much about Peggy's abuse and extreme manipulation of Greg and her other misconduct. It was only after he moved to Massachusetts and began looking into it all that he learned of these things.

On 11/18/02 Vincent filed a petition in the Probate Court to have [illegible] executrix removed. (A1-34; A1-10.)

On 4/25/03 Vincent filed an action in the Superior Court, alleging *Interference With The Expectancy Of Receiving A Gift* and *Wrongful Death.* (A2-784.)

On 5/20/03 Peggy filed a Motion For Summary Judgment in the Probate Court regarding Vincent's petition to have her removed as executrix. On 6/24/04 the Probate Court granted summary judgment in Peggy's favor. (A2-752, 753.) Vincent filed a notice of appeal of this order on 7/19/04. (A2-769)

On 6/23/05 Vincent filed a motion for reconsideration[6] of the 6/24/04 order granting summary judgment. (A1-13; A2-771.)

Subsequently, on 7/1/05, Vincent filed an Amended Motion For Reconsideration of the 6/24/04 order (which complied with Standing Order 2-99; the original version did not). (A2-834.) When he later discovered that the Probate Court had already denied the original Motion For Reconsideration of the 6/24/04 order before the Amended Motion For Reconsideration of that order had been filed, he filed another (third) Motion For Reconsideration (on 7/14/05), which urged the court to reconsider its position and review the amended (second) version in place of the original (first) version. (A2-885.) The Probate Court denied this motion on 8/17/05. (A2-891.) The petitioner filed a notice of appeal of this order on 9/14/05. (A2-893)

On 8/14/05 Vincent filed a timely motion for report of material facts pertaining to the Probate Court's denial of the original Motion For Reconsideration of the 6/24/04 order. (A1-13 and A1-892.) The Probate Court denied this motion on 8/17/05. (A2-892.) The petitioner filed a notice of appeal of this order on 9/14/05. (A2-893)

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[6] It was actually a motion for relief from judgment (pursuant to Mass. Rules of Civ. P., Rule 60(b) [see Ap.O-104]) or a motion for reconsideration.

On 8/14/06 the Mass. Court of Appeals denied Vincent's appeals. (Ap.B-63.) On 11/2/06 the Mass Supreme Judicial Court denied an application for further appellate review. (Ap.C-71.)

D) Background: Issues Argued In The Lower Courts relating to the executrix's unsuitability:

1) Peggy perverted the selection process: Peggy manipulated the selection process in several ways, preventing Vincent and Lydia from being afforded a full and proper opportunity to each choose their five non-major paintings:

1.1) *She claimed 48 paintings had been given to her:* She dubiously claimed that Vincent and Lydia could not choose from among 48 of the paintings because, she asserted, Greg had given them to her prior to his death and so they were not part of the estate. Vincent provided substantial evidence showing that this claim was false.[7] (MCA.Op.Br-5-7; A1-418.) Peggy's only response in her appellee's brief was to merely state (without support) that Vincent's allegations were without substance and that there was "inherent difficulty" in proving that the gifts were in fact made. MCA.Peggy.Br-11.

1.2) *Peggy manipulated the art expert, Dr. Carl Belz:*

1.2(A) *She covertly resubmitted paintings to Dr. Belz:* After Dr. Belz had made his initial determinations of which paintings were major and which were non-major and had submitted his lists of his determinations to Peggy's attorney, she covertly contacted Dr. Belz on at least two occasions and resubmitted a number of paintings to him, encouraging him to reconsider his categorizations for these paintings. This resulted in him recategorizing 14 paintings from "non-major" (available for Vincent and Lydia to choose from) to "major" (not available for Vincent and Lydia to

[7] This evidence included, inter alia, notes created by Peggy which strongly implied that she was merely claiming paintings she wanted as hers, rather than that Greg really gave them to her.

choose from) and one from "major" to "non-major." Thus Peggy manipulated the process to her advantage by removing some of the better non-major paintings from the pool of non-major paintings available for Vincent and Lydia to choose from.[8]

1.2(B) *She misled Dr. Belz:* Peggy misled Dr. Belz about the future disposition of the paintings in the major category. Peggy repeatedly told Dr. Belz that his determinations of which paintings were major and which were non-major would define Greg's legacy (implying that the "major" paintings would be destined for museums or other modes of public display instead of being sold to private collectors). In his deposition Dr. Belz admitted that this caused him to "err" on the side of placing more paintings into the major category (not available for Vincent and Lydia to choose from) rather than the non-major category (available for Vincent and Lydia to choose from). (Also, Peggy did not explain to Dr. Belz that placing better paintings into the major category financially benefited her.) Subsequently, Peggy completely ignored the major/non-major categories created by Dr. Belz and made no special efforts to place the paintings into museums. *She now insists that she has no obligation to place paintings in museums.* (MCA.Peggy.Br-22.) Thus she tricked Dr. Belz into placing as many paintings as possible into the major category (so that Vincent and Lydia could not choose from among them) by telling him that these paintings would be going to museums and then she made no effort to place them into museums.[9]

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[8] Paintings not chosen by Vincent and Lydia get sold by the trust with the proceeds going to Peggy. Thus it benefits her to prevent Vincent and Lydia from choosing the more valuable non-major paintings.

[9] Both the Probate Court and the Appeals Court cited Dr. Belz's "undisputed testimony," indicating that he did not think Peggy had manipulated him, as evidence that she hadn't done so. (Ap.A-51; Ap.B-67.) However, he only said this because he didn't understand that Peggy was not going to place the major paintings into museums (contrary to what she had told him). His testimony clearly implies that if he had

2) The National Academy Museum: Peggy *falsely* indicated to the court that she had arranged to donate a painting to the National Academy Museum. (MCA.Op.Br-15-16.) This allegation is *undisputed.*

3) Peggy grossly undervalued the estate: Peggy initially (prior to the start of the litigation) grossly undervalued the estate in court filings (assigning it a value which was less than $1/10^{th}$ of its actual value), apparently in an effort to avoid drawing the attention of Vincent and Lydia. (MCA.Op.Br-p. 15.) This allegation is *undisputed.*

4) Peggy was caught red-handed, lying to the Superior Court. She falsely claimed that she did not have the prior wills and prenuptial agreements (these were some of the items which the court had ordered her to produce) in her possession and that she therefore could not produce them. This allegation is *undisputed.* (MCA.Op.Br-25.)

5) Peggy tried to manipulate Lydia into trading the "Waterfall" painting (one of her choices of five non-major paintings) in exchange for a less valuable painting (MCA.Reply.Br-17).

6) Peggy refused to place paintings in museums: Peggy ignored the terms of the will requiring paintings to go to museums and she just sold them to private collectors instead (MCA.Op.Br-10-13, 9-10).

7) Peggy tried to stiff the Forum Gallery regarding a large debt which she owed: Peggy unethically tried to evade an obviously legitimate debt of $260,000 to Greg's dealer, the Forum Gallery, which had represented him for over 30 years. Her conduct towards the gallery was insidious and unethical and it resulted in unnecessary litigation, after which the parties settled and she was forced to pay the debt anyway.[10] (MCA.Op.Br-pp. 13-15.)

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known this he would have made different categorizations for some of the paintings and this shows that he had, in fact, been manipulated.

[10] See the comments from the judge in the Forum Gallery vs. Peggy Gillespie, et al. lawsuit. (Ap.H-95.)

8) Peggy unethically tried to evade the petition to have her removed as executrix by asking for and receiving an extension regarding the date for her to submit her accounting by (Vincent opposed granting this extension of time) and then using that time to transfer the paintings to the trust (prior to her filing the accounting) and then dubiously claiming that the petition to remove her as executrix of the estate was moot since the paintings were in the trust and no longer in the estate. (MCA.Reply.Br-4.) (A1-398. See also A1-189.)

VIII) DISCUSSION:

A) Does Vincent have standing on behalf of the public interest?

Both lower courts ruled that Vincent doesn't have standing to seek the removal of the executrix as an individual acting on his own behalf, and that there was insufficient evidence of misconduct on the part of the executrix to warrant the court acting sua sponte to remove her. (These issues have been covered to some extent in the previous section titled "Background: Issues Argued In The Lower Courts Relating To The Executrix's Unsuitability.")

The lower courts also ruled that Vincent does not have standing to act on behalf of the public interest to seek the removal of the executrix. (This issue was discussed in the lower courts in many places including: A2-700, MCA.Op.Br-38 and MSC.FAR-10-14.) Here we will discuss this issue:

As discussed above, Greg was a highly renowned and prominent artist. It is in the public interest that his work be placed in museums so that it will be available for public viewing, consistent with the directives in his will. (See the "General Background Information" section, pp. 1-2. See also the letters from museum directors, Ap.F-90 and Ap.G-92.)

Greg's will states that it was his *primary intention* that his paintings should be sold in such a way that the viewing audience of the paintings will be maximized after their sales. The will, article Ninth (Ap.E-83-84), states the following:

"The program of sales shall be in accordance with the following guidelines:

"A. It is my primary intention that my works of art be sold to institutions or individuals that will permit the widest possible audience to view my works after their sale. Accordingly, my executrix shall endeavor to sell my works of art to museums, universities and other charitable organizations that will be able to place my works of art on public display. My executrix may also make sales to private collections, and, in her discretion, my executrix may require certain commitments of public display as part of the negotiations for the sale of any of my works of art.

"B. It is also my intention that the sale of my works of art shall be made on a timely basis in the light of public acceptance of, appreciation of, and demand for my works of art so as to maximize the sales price for each work of art sold. I understand that demand for my works of art may fluctuate, and, accordingly, I request that my executrix participate with the aforementioned Trustees to establish a flexible program of sales, recognizing that there may be a need to spread sales over a considerable period of time."

The above quotation from the will is duplicated in the trust, underscoring its importance. The meaning of these few sentences has been the subject of intense disagreement and dispute by the parties in this case and even the two lower courts disagreed with each other to a significant extent on the intended meaning. (Ap.A-55; Ap.B-68.)

Unfortunately, Peggy believes and insists that these words put *no obligation on her whatsoever* to place paintings in museums, and she has acted accordingly. (MCA.Peggy.Br-22.) She didn't even bother to inform the dealers who had shows of Greg's work about the terms of the will (requiring

paintings to be sold so that they will be placed on public display). (She has admitted this fact.) During her 6 ½ year tenure as executrix only two small paintings have gone to museums.[11] (A1-421. MCA.Op.Br-11.)

It should be understood that Peggy has a direct conflict of interest here. Proceeds from the sales of the paintings go to Peggy. However, placing paintings in museums, even for a renowned artist, often requires substantially reducing prices or even donating the paintings. Thus for Peggy to place paintings into museums requires her to sacrifice some of her profits by selling paintings for less money. So Peggy is really the wrong person to have as executrix of the estate, since her financial interests run counter to the primary intention of the testator.[12] (MCA.Op.Br-12, 29; A1-427-428.)

Thus Vincent has argued in various pleadings that he has standing to act in the public interest. The public interest issue here is whether or not about 390 paintings by a highly renowned artist, Gregory Gillespie, will be sold in such a way that they will be available for the public to view them (i.e., placed in museums), or whether they will be sold to private collectors, where the public will have much less of a chance of ever seeing them. Peggy claims that she has no

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[11] Even those two museum sales appear to have occurred simply through the normal course of events rather than through any special effort by Peggy to place paintings in museums.

[12] Note that the fact that Greg didn't foresee that Peggy would just try to get as much money as possible, disregarding the terms of the will covering his wishes about placing paintings in museums, is consistent with her treatment of him during his life. She abused, manipulated and extorted from him in many ways throughout their relationship, including pressuring him into creating a will which gave almost all the assets to her. These allegations are contained in the pending Superior Court action (A2-845). Greg had a unique, unbalanced and insecure personality which was fanatically and obsessively focused on his art. This left him very weak in certain ways and vulnerable to manipulation by Peggy. Peggy's refusal to put paintings in museums while profiting from the will is a continuation of the way in which she exploited Greg prior to his death. Understanding this will help the reader make sense of the entire picture.

obligation to place the paintings in museums and she is clearly intent on proceeding on a course in which she does not place them into museums. This will maximize her profits but it will harm the public interest and thwart Greg's primary intention. Peggy has a complete conflict of interest.

Vincent cited Kapialani Park Preservation Society vs. Honolulu (751 P.2d 1022 (1988)) in the Probate Court.[13] In that case there was a charitable trust with the public as a beneficiary. Kapialani Park was a free public park to be maintained by the trustee, the City of Honolulu. The city sought to lease out a portion of the park to a company which sought to establish a restaurant on it but other parties claimed that this was in violation of the terms of the trust. The Attorney General sided with the city. The HI Supreme court ruled that under those circumstances "...members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court." Otherwise, that court wrote, the trustee could do as it pleased with the trust, with the concurrence of the Attorney General, "...without the citizens of the City and State having any recourse to the courts. Such a result is contrary to all principles of equity and shocking to the conscience of the court." (Kapialani at 1025.)

In the instant case the Massachusetts Attorney General's Office declined to become involved (A2-740, 704). Judge Wilson's Memorandum acknowledges that if the will was charitable then the Kapialani case would apply to the instant case. (Ap.A-56.) He also claimed, however, that the will was *not* charitable (implying that the Kapialani case did not apply). And this has been a central and key question throughout these proceedings: Is the will charitable?

Judge Wilson cited several fallacious premises to support his conclusion that the will is not charitable:

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[13] The fact that Vincent cited an out of state case for a Massachusetts court is not blameworthy here because judge Wilson of the Probate Court explicitly invited out of state case law (MCA.Tr-55).

First he asserted that the executrix has the ultimate discretion of whether or not to sell any art work at all. (Ap.A-54.) (The appeals court also cited this point. [Ap.B-68.]) Although the will does say this, this actually doesn't mean all that much. Greg knew that Peggy would have no interest in keeping 420 paintings for a long time. He also knew that she had an incentive to sell them so that she could get the money from the sales. So he knew that most or all of the paintings were probably going to be sold.

Also, many of his paintings had been hanging around unsold for many years (that's why there were about 420 paintings in the estate when he died) and Greg was used to waiting for considerable periods of time before paintings sold. Thus, this clause reflects that Greg was not in a rush to get the paintings into museums, as long as they eventually ended up there, and if they were held for some time prior to their sales this was fine.[14]

The Probate Court also claimed, in arguing that the will was not charitable that "...although the decedent's intent is for the widest possible audience for his artwork, the executrix has complete discretion whether to require commitments of public display for the sale of any artwork..." (Ap.A-54-55.) The Appeals court also understood this point in this way. (Ap.B-68.) *This is a huge, fundamental misunderstanding and misreading of an utterly key point in the will, engaged in by both lower courts.*[15] Let us carefully analyze this point in the will so that we can see what it actually is saying:

Greg wanted his paintings sold in a way that would put them on public display as much as possible. However, accomplishing this can be difficult, even for a prominent

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[14] This clause is also consistent with the phrase in Article Ninth of the will that says: "...there may be a need to spread sales over a considerable period of time."

[15] Whenever this brief refers to "both lower courts" it is referring to the Hampshire Probate Court and the Mass. Court of Appeals. It is not referring to the Hampshire Superior Court, despite the fact that a related action is pending there.

artist. Greg knew this. Thus, after stating that the viewing audience of the paintings should be maximized he directed the executrix to pursue four avenues which could help accomplish this goal. (Please refer to the quotation above [p. 9] from article Ninth in the will as necessary.) The sentence immediately following the sentence about maximizing the viewing audience contains the first three of these avenues. It says: "Accordingly, my executrix ***shall*** endeavor to sell my works of art to [1] museums, [2] universities and [3] other charitable organizations that will be able to place my works of art on public display." (Emphasis and numbers in square brackets have been added.) Those are the first three avenues for getting paintings on public display and there is *no wording about the executrix having discretion with regard to these three avenues*. The phrase "shall endeavor" is used. "Shall" is *not* a discretionary term.

In the next sentence the will explains a fourth avenue for getting paintings on public display. He writes: "My executrix may also make sales to private collections, and, in her discretion, [4] my executrix may require certain commitments of public display as part of the negotiations for the sale of any of my works of art." (Number in square brackets added.) This fourth avenue contains a discretionary term ("...in her discretion...") and *that discretionary term applies only to this fourth avenue*. It does *not* apply to the first three avenues for getting paintings on public display.

So both lower courts completely misunderstood the will (and the trust which contains the same language) on whether or not the executrix is given discretion on whether or not to sell to museums (or universities or other charitable organizations which will put the paintings on public display). The will actually does not give the executrix much discretion on this point.

It is very significant that both lower courts misread this key phrase in the will as saying that the entire issue of placing paintings on public display is discretionary. As discussed above, this is a very incorrect reading of the will.

The Probate Court cited another reason as well for concluding that the will was not charitable. It asserted that article Ninth also states that Greg wanted his prices maximized. Thus, judge Wilson reasoned, the only reason why Greg wanted his paintings in museums was to maximize prices to get more money for Peggy and Jay and thus the two concepts, maximizing prices and maximizing the viewing exposure of the paintings after their sales, both served the same single purpose of getting more money for Peggy and Jay.[16] Thus, judge Wilson concluded, there was no charitable intent at all in the will (and so the Kapialani case did not apply). (Ap.A-55.)

This reasoning is flat out false and as part of the motion for reconsideration Vincent produced several affidavits from relatives who affirmed that Greg's primary aim was getting paintings into museums so they would be widely viewed and appreciated and that the reason why he wanted to maximize the prices was to maintain the *prestige* of the paintings, which is consistent with having his paintings widely viewed, appreciated and respected by the public (A2-852-855). Thus maximizing prices and maximizing the viewing audience both serve the purpose of having his paintings widely viewed and appreciated by the public. The Probate Court responded to this evidence presented in the motion for reconsideration by denying the motion without comment and then refusing to provide a report of material facts on why it did so.[17]

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[16] Although prices often need to be reduced to get paintings into museums, it can also be argued that in the long run placing paintings in museums increases prices. This is because it increases their prestige and over time this increases the prices of the artist's work.

[17] The Probate Court also appeared to indicate that for there to be a charitable purpose there needed to a gift (i.e., it should be given "for free"). (Ap.A-53; also: MCA.Peggy.Br-20.) This is incorrect. See MGL 68 § 18 (Ap.K-100). There is no requirement that something be given "for free." Selling paintings to museums is "welfare related" and it "benefit[s] the general public or some indefinite class thereof" so it is a charitable endeavor, in accordance with M.G.L 68 §18. (MCA.Reply.Br-14.)

The appeals court, after reading the appellate briefs which discussed these affidavits, seemed to disagree with judge Wilson's reasoning by implying that the language in the will about maximizing the viewing audience, Greg's primary intention, *was charitable*. However, they also asserted, in so many words, that this charitable intent was outweighed by the rest of the will, which, they said, was primarily to benefit Peggy and Jay. (They wrote: "Although there is language in the decedent's will indicating that he sought the widest possible audience for his work, the will as a whole is clearly designed to benefit Peggy and Julianna." Ap.B-68.)

The appeals court then went on to give four reasons to explain why it concluded that the will as a whole was not charitable and that it was designed to benefit Peggy and Jay:

(1) They state that the executrix has discretion as to whether to sell any artwork at all. (Ap.B-68.) The implications of this are ambiguous, as discussed above.

(2) They state that "...the executrix has discretion to require commitments of public display as part of the sale of any artwork." (Ap.B-68.) They misunderstood this key point, as discussed above.

(3) They write that "[t]he decedent indicates that sales of artwork should be timed to take maximum advantage of demand." (Ap.B-68.) This sentence is apparently for the purpose of maximizing sales prices and thus maintaining the *prestige* of the paintings, which is consistent with Greg's overall objective of having his paintings viewed, appreciated and respected by as wide an audience as possible. These issues are addressed in the affidavits included in the motion for reconsideration and they are discussed below (pp. 18-19).

(4) The appeals court also asserts the fact that the paintings got moved to the trust which has Peggy and Jay as beneficiaries as a reason why they conclude that the primary intent of the will was to benefit Peggy and Jay and not the general public. (Ap.B-68.) They apparently missed the fact that the trust contains virtually identical language as that contained in article Ninth of the will about Greg's primary

intention being to maximize the viewing audience of the paintings after their sales. That is a very important misunderstanding on the part of the Appeals court.

Thus the appeals court's reasoning for concluding that the primary intent of the will was not charitable, not to benefit the public, but rather to benefit Peggy and Jay, does not stand up to scrutiny.

Also, in determining that the will was not charitable both lower courts also ignored the following evidence:

- The fact that the provision regarding a desire to maximize the viewing audience of the paintings is preceded by the declaration that it was Greg's primary intention.
- The fact that Peggy admitted that it was Greg's lifelong objective to have his paintings in museums. (A1-233-234 [Par. 12]; MCA.Reply.Br-17.)
- Under certain conditions (if Greg and Peggy and Jay die before Jay reaches the age of 25 and Jay has no surviving children), the will gave gifts to specifically named charities, e.g., $20,000 to Amnesty International. (MCA.I-54-55.)
- Greg required that an art expert be hired to evaluate every single painting in the estate and categorize it as either "major" or "non-major," with "major" being defined as "extraordinary quality or museum caliber quality". This implies that he wanted the "major" paintings to be placed on public display, in museums.
- They also assumed that Greg expressed himself in such a nonsensical way that he stated his primary intention of placing paintings in museums and then added so many discretionary terms that his primary intention could be completely negated and ignored. This doesn't make sense.

Additionally, in coming to the conclusion that the will is not charitable, both lower courts ignored the following points from American Jurisprudence:

(1) "...an intermixture of selfish interest or benefit in an otherwise charitable trust will not ordinarily defeat its

charitable classification, at least not entirely." (15 Am.Jur.2d. §6.)

(2) "Words of recommendation, request, entreaty, wish, or expectation will impose a **binding duty** upon the donee or devisee by way of trust..." (15 Am.Jur.2d. §8.)

(3) *"A trust for the support of an art or other public museum is also a valid charitable use..."* (15 Am.Jur.2d §50.)

(4) "Every intendment favors charities and gifts for charitable purposes, and it is not only a policy of the people, but likewise a legislative policy, to deal broadly and sympathetically with charity." (15 Am.Jur.2d §11.)

(5) *"Gifts or trusts for charitable purposes are favorites of the law and the courts*. It is the fixed policy of the law to uphold charitable gifts and trusts whenever possible....**Courts of equity, it is said, will go to the length of their judicial power to sustain such gifts."** (15 Am.Jur.2d § 118.)[18]

(6) "**...it is the rule that where doubt exists, a gift must be interpreted in favor of a charity.** Where they cannot be followed literally, the courts usually apply the cy pres or a similar doctrine." (15 Am.Jur.2d § 118.)[19]

(7) "While the intention of the testator or donor is the touchstone ... **that intention, if a charitable one, will be effectuated by the most liberal rules of construction that the law will permit.** Charitable gifts are construed liberally and upheld if reasonably susceptible of a construction which gives them validity." (15 Am.Jur.2d § 119.)

(8) *"A court of equity has jurisdiction to fill vacancies, break stalemates, and inject itself where there is a threat to prevent the accomplishment of the objectives of a charitable trust*." (15 Am.Jur.2d § 130.)

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[18] This is an extremely potent section of American Jurisprudence regarding charitable trusts and it is right on point here. The reader is urged to review the entire section at Ap.N-103.

[19] Ibid.

(All emphases in the above quotes are added.) (Similar points as the above 8 points were raised with the lower courts at: MCA.Op.Br-34-38; A2-702-705; MSC.FAR-11, 13-14.)

These are very strong words. The above citations provide ample basis to find that the will is charitable and that Vincent has standing to petition for Peggy's removal. These citations also show that courts should be doing all they can to support a charitable interpretation of the will and the implementation of that charitable purpose. However, in this case the lower courts seem to be doing the opposite, they seem to be trying to thwart a charitable interpretation and purpose. The Mass. Appeals Court has *implicitly acknowledged that Greg's primary intention is charitable* and yet they still interpret the will itself as non-charitable. (See p. 15, above; Ap.B-68.) That is surely not in keeping with the above principles.

From another perspective, one can play around with words and definitions regarding this topic all day long (as has been done in the lower court pleadings) but one only needs to look simply and straightforwardly at this issue to see that there is a real public interest at stake here. Whether or not hundreds of paintings by a highly renowned artist will be available for the public to view them is at stake. This is an issue of significance to the general public. Great art can inspire and bring insight or joy to the viewing public. It can also provide guidance to aspiring artists, accomplished artists and to art scholars as well. The Supreme Court's intervention is needed here so that society will not loose the benefit of having this excellent art available to the public.

B) The Motion For Reconsideration of the Order Granting Summary Judgment:

B)(1) The three affidavits about Greg's intentions:

The motion for reconsideration of the order granting summary judgment included three affidavits from Vincent, Lydia and Alice Bonavita (Greg's sister), which addressed

the issue of Greg's overall objective in maximizing the viewing audience of his paintings after their sales:

Judge Wilson's Memorandum incorrectly reasons that Vincent did not have standing on behalf of the public because the estate was not charitable in nature because Greg wanted to maximize the viewing audience of his paintings only for the (non-charitable) purpose of getting more money for Peggy and Jay, and not because of a (charitable) intention and desire to have his works widely viewed and appreciated by the public. (Ap.A-55.) That court also cited the clause in the will about maximizing sales prices (saying that this also showed a non-charitable intention). (Ap.A-55.)

The three affidavits in the motion for reconsideration explicitly refuted these ideas. (A2-852-855.) The affidavits explained that Greg wanted his paintings in museums so that they would be widely viewed and appreciated by the public, and not for the purpose of getting more money for Peggy and Jay. The affidavits also explain that the reason why Greg's will discusses maximizing sales prices was to maintain the *prestige* of the paintings and that, consistent with this, his overriding and strongly held objective was to have his works as widely viewed and appreciated as possible by the public.[20]

B)(2) The Superior Court action:

The Motion for reconsideration also included a discussion about the Superior Court action and how that gives Vincent standing to pursue the petition in the Probate Court seeking the executrix's removal. (This issue was raised in the lower courts: A2-835-839; MCA.Op.Br-23-25, 44, 46-47; MSC.FAR-15-17.)

Vincent filed an action in the Hampshire County Superior Court on 4/25/03. The causes of action were *Interfering With The Expectancy Of Receiving A Gift* (i.e., undue influence regarding the will) and *Wrongful Death*. Peggy, as the executrix of the estate, has control of many documents

[20] These affidavits must be assumed to be truthful. See p. 30, fn 30.

pertaining to Greg and the estate and she is responsible for responding to discovery requests for such documents. Her reaction to the Superior Court action has been a pattern of stonewalling and obfuscation and she has so far refused to provided any significant discovery evidence at all and she has filed frivolous motions. (MCA.Op.Br-23-25.) She has also refused to waive Greg's attorney-client and psychiatrist-patient privileges (which pass to her as executrix of the estate), creating another obstacle to providing discovery.[21]

This situation is strikingly similar to the case of District Attorney for the Norfolk District vs. David Magraw (1994), 417 Mass. 169. In that case David Magraw was the executor of his deceased wife's estate. He was also a suspect in her death. His wife's will named him as executor. As the DA investigated the case they sought to speak to her attorney and psychiatrist to find out about the nature of her relationship to her husband. He refused to waive her attorney-client and psychotherapist-patient privileges, preventing her therapist and attorney from testifying at a grand jury hearing. The Probate Court denied a motion by the DA to remove Mr. Magraw as executor but the appellate court disagreed and ordered him removed. The Mass. Supreme Court affirmed the Appeals Court's decision. They wrote:

> "[The facts of the case] illustrate an obvious conflict of interest. The defendant, as a suspect in his wife's death, has an interest in keeping from authorities any information which has the possibility of inculpating him. This interest certainly "creates reasonable doubt" that he honestly, fairly, and dispassionately could execute his responsibilities as executor of his wife's estate."
>
> (Norfolk at 174-175.)

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[21] A recent order dated 12/13/06 from the Superior Court required her to waive Greg's psychotherapist-client privilege enough to facilitate discovery.

The facts of the Superior Court case against Peggy are very similar to those in the Norfolk case. Peggy has an interest in keeping from the plaintiff any evidence which could inculpate her in the *Wrongful Death* claim or in the claim of *Interfering With The Expectancy Of Receiving A Gift*. She should be removed for essentially the same reasons that David Magraw was removed as executor.

But, the reader may wonder, will Peggy's conduct as executrix really be compromised by the conflict of interest described in the Norfolk case? Answer: aside from the facts that she has stonewalled and refused to provide meaningful discovery for years in the Superior Court case and that she refused to waive Greg's attorney-client and psychotherapist-patient privileges which has thwarted discovery, *she was also caught red-handed, brazenly lying to the Superior Court about what evidence she had.* She responded to an order from the Superior Court requiring her to produce discovery, in part, by claiming that she did not have Greg's prior wills and prenuptial agreements in her possession and so she couldn't produce them. These documents constituted important evidence which probably would help show that she caused undue influence on Greg regarding his will. Vincent responded by providing the court with proof that she was lying, a letter from her attorney admitting that these documents were in his possession. *Peggy has never attempted to refute this evidence so this allegation has been conceded.*

As in the Norfolk case, the Court in this case should act sua sponte to remove the executrix. (Norfolk at 174.) Quincy Trust Company v. Taylor, (1944) 317 Mass. 195, 196-197.

Also, as the plaintiff in the Superior Court case Vincent clearly has standing to pursue a petition for Peggy's removal.

Additionally, M.G.L. 230 §5 holds that an heir or legatee can bring an action to enforce a claim on behalf of an estate without removing the executor when the executor refuses or is unable to bring such action at the request of the heir or legatee. (Ap.I-98.) This gives Vincent standing to pursue the

removal of the executrix in the Probate Court on behalf of the estate as a matter of law.[22] (MCA.Op.Br-44; A2-845.)

So there are several ways in which the Superior Court action gives Vincent standing to pursue the petition for removal of the executrix in the Probate Court. The Superior Court action definitely gives Vincent standing.

The motion for reconsideration of the order granting summary judgment included, inter alia, discussion of both of the above topics: the affidavits addressing Greg's objective in seeking to maximize the viewing audience of his paintings after their sales, and the implications of the Superior Court action on Vincent's standing.[23]

What was the response of the Probate Court to all this evidence in the motion for reconsideration? That court denied the motion without comment. This was difficult to fathom.

Similarly, the appeals court essentially refused to discuss the contents of the motion for reconsideration. It merely said, in essence, that the review standard was an abuse of discretion standard, that Vincent did not present sufficient new evidence to warrant granting the motion for relief from judgment, and that judge Wilson did not abuse his

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[22] In the Superior Court case Vincent is named as a plaintiff acting as an individual and on behalf of the estate. (A2-844.)

[23] The Motion For Reconsideration of the order granting summary judgment also addressed other topics, including:

(1) Judge Wilson erroneously implied that the Mass. Attorney General's Office declined to get involved in the case because they had determined that the will was not charitable. (Ap.A-54.) The motion for reconsideration presented evidence (an email from the Attorney General's Office) showing this to be incorrect. (A2-744; MCA.Op.Br-22 [fn 16].)

(2) Judge Wilson wrongly stated that Vincent was represented by counsel when the will was submitted for probate and that his counsel wrote that Vincent had no objection to that petition. (Ap.A-36, 46.) The motion for reconsideration included an affidavit from attorney Tom Lesser, showing that this is incorrect. (See fn. 4 on p. 3, above.) (A2-813; MCA.Op.Br-25-26.)

discretion.[24] (Ap.B-69-70.) How can the great similarity of the Norfolk case to the Superior Court case not show that Peggy should be removed? How can the *undisputed* fact that Peggy was caught brazenly lying to the Superior Court about crucial evidence not be important enough evidence?

Vincent will obviously have great difficulty in proceeding with the Superior Court case and collecting evidence with Peggy as the executrix. How could both lower courts just ignore this evidence? Have they thrown the rule of law out the window?

C) The Probate Court's failure to provide a report of material facts:

As discussed above, the Probate Court denied without comment the motion for reconsideration. (A2-891) Subsequently, seeing the Probate Court's total silence on the issues in the motion for reconsideration, Vincent filed a motion for report of material facts, pursuant to M.G.L. 215 §11. (Ap.J-99.) (This issue was raised in the lower courts at: MCA.Op.Br-30-31, 42; MSC.FAR-16.) The motion was filed in a timely and proper manner and there is no allegation

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[24] The appeals court also implied that the evidence in the motion for reconsideration was previously discoverable. (Ap.B-69.) This is incorrect:

The three affidavits about Greg's intentions were obtained in response to Judge Wilson's Memorandum, which wrongly asserted that Greg wanted paintings in museums just to increase prices (Ap.A-55). Vincent couldn't have known ahead of time that Judge Wilson would use such dubious reasoning.

Most of the information about Peggy thwarting discovery in the Superior Court action occurred only after judge Wilson's order granting summary judgment, including most of the extensive pattern of stonewalling and obfuscation, her refusal to waive the attorney-client and psychotherapist-patient privileges (just like David MacGraw in the Norfolk case), and her getting caught lying to the court about the prior wills and prenuptial agreements. Thus, while the existence of the Superior Court action was known to the Probate Court prior to Judge Wilson's Memorandum, the pattern of obfuscation and clear evidence of misconduct in that case was not known. This was new evidence.

So there was no lack of due diligence in finding new evidence.

by any judge or party to the contrary. Judge Wilson denied this motion. His only justification was a handwritten note which said: "See Memorandum of Decision on Motion For Summary Judgment, Dated June 24, 2004, which continues to express the Court's position." (A2-892.) This comment is frivolous and nonsensical because *that Memorandum does not even mention any of the main points raised in the Motion for Reconsideration.*[25]

Furthermore, note that the law does not give judge Wilson discretion on whether or not to grant a motion for report of material facts. The law, M.G.L. c. 215 § 11 (see Ap.J-99), *requires* him to produce a report of material facts in this case. Such a report may be very important to an appeal. For judge Wilson to refuse to provide the report of material facts is a blatant violation of law and, simultaneously, an act which wrongly and unfairly *sabotages Vincent's appeal*. This very Petition For Writ Of Certiorari which the reader is now reading has probably been significantly compromised because judge Wilson refused to provide a report of material facts explaining why he denied the motion for reconsideration. Likewise, the appeal to the Mass. Court of Appeal and the Application For Further Appellate Review to the Mass. Supreme Judicial Court have both probably been significantly *compromised and sabotaged.* If we don't know judge Wilson's reasoning for denying the motion for reconsideration, how can we properly discuss it in the Appellate Briefs?

Furthermore, to allow this lower court ruling to stand is to allow a precedent which says, effectively, that any judge who is biased against a party has license to rule against them without legal basis and then to thwart their right to appeal

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[25] Judge Wilson's Memorandum does discuss the Norfolk case, but only in the context of the Probate Court case. (Ap.A-57-60.) In the motion for reconsideration Vincent cited this case specifically in the context of the Superior Court case. (A2-838; MCA.Op.Br-45, 46-47; see also A2-696-697.) Judge Wilson's Memorandum doesn't even mention the Superior Court case.

that decision by refusing to provide a report of material facts. *Note also that this precedent could interfere with the power of the US Supreme Court to properly review lower court decisions.* Allowing this precedent to stand gives license to lower courts to thwart appeals, including appeals to the US Supreme Court, by refusing to provide reports of material facts.

Judge Wilson's refusal to provide a report of material facts is totally unfair. What is the point of preparing pleadings according to law and of paying very large sums of money to attorneys if the courts will receive the pleadings and then simply act with total disregard for the law when they feel like it? What is one supposed to think of the courts when one provides clear-cut evidence of one's standing and the courts simply ignore it – pretend that they didn't read it – and then when one asks them for an explanation (the report of material facts) they simply refuse to provide it, despite the fact that the law requires them to provide it?

The petitioner is being denied his right to a proper appeal from the Probate Court order granting summary judgment, he is being denied his right to act through the courts to protect his father's legacy (by making sure his father's paintings are placed in museums, as he directed in his will), and he is being denied his right to properly pursue a civil action relating to his father's estate in the Superior Court, all on account of blatantly illegal action by judge Wilson.

Judge Wilson's refusal to provide a report of material facts is flat out illegal and it has violated the petitioner's rights to full and proper access to the courts under the Mass. Constitution and under the US Constitution (MSC.FAR-8):

The Massachusetts Constitution, Part One, Article XI guarantees citizens' rights to proper access to the courts. (See Ap.L-101.) This statute is being violated by the lower courts because the petitioner is being denied his proper right to appeal in the Probate Court case and he is also being denied the right to properly obtain discovery in the Superior Court case (Peggy has refused to produce discovery and the lower

courts' conduct is wrongly thwarting a petition to remove her) so that he can pursue that case.

Judge Wilson's illegal refusal to provide a report of material facts and the Mass. Appeals Court's refusal to address this and both lower courts' refusals to even discuss the evidence pertaining to the Superior Court case violate and negate Vincent's rights under the Mass. Constitution to have a fair and reasonable chance to find justice in the courts.

Also, the petitioner's rights under the US Constitution are being violated. The 14th Amendment states: "No State shall ... deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisidiction the equal protection of the laws."* (Ap.M-102.) If the courts are violating the petitioner's state rights to access to the courts then this is also a violation of his right to equal protection of the laws guaranteed by the 14th Amendment of the US Constitution. (MSC.FAR-8.)

D) Misunderstandings And Bias In The Lower Courts:

Vincent contends that the Probate Court was biased against him and held quite a few significant misunderstandings about this case. The Appeals Court seems to have adopted some of Judge Wilson's misunderstandings after reading them in his 16 page memorandum explaining his decision to grant summary judgment. This section discusses these misunderstandings and this bias. The reasons for including this section are: (1) it helps explain why the lower courts took some very conspicuous positions (such as both lower court's refusals to acknowledge the obvious significance of the Superior Court case), and (2) Vincent is concerned that if these misunderstandings are not clarified this court might adopt some of them, just as the appeals court adopted some of the misunderstandings of the Probate Court.

What were the misunderstandings? In addition to those discussed or mentioned above there are several others:

One misunderstanding (or bias) relates to the petitioner's motives. Peggy has argued ad nauseam, in almost every

hearing and pleading of hers, that the petitioner's only motive is animosity towards her and dissatisfaction with his take under the will and that therefore the entire case (in both the Superior and Probate Courts) is without merit. Apparently, her attorney convinced the Probate Court of this.[26]

However, this is simply not correct. Vincent was appalled when he learned that Peggy had been refusing to place Greg's paintings in museums, in violation of Greg's wishes. Furthermore, her manipulation of Dr. Belz and the process by which Vincent and Lydia were to select their paintings, as well as many other acts of misconduct by her, were unacceptable. Regarding the Superior Court case, Vincent has significant evidence showing that Peggy manipulated, abused and subjugated Greg in their relationship, including creating undue influence regarding the will and including abuse which contributed to Greg's suicide. For the Probate Court and the appeals court to assume that the Superior Court case is unmeritorious (as they apparently did) is patently unfair because they have not seen any of the evidence pertaining to that case. The only court which has considered some of the evidence and issues from that case, the Superior Court itself, has issued several rulings favorable to Vincent. (MCA.Op.Br-23-25.)

Both lower courts also misunderstood another point relating to the 48 paintings which Peggy dubiously claimed were given to her by Greg prior to his death. At the 6/11/03 and 8/27/03 hearings in the Probate Court, it was agreed that Peggy would change her position and allow Dr. Belz to categorize these paintings and allow Vincent and Lydia to choose their paintings from among the non-major ones in this group (as well as the other non-major paintings in the estate). The Probate Court cited the fact that Vincent did not reselect paintings after this agreement as implying that he had

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[26] For example see Ap.A-52. ("The petitioner's real disagreement therefore appears to be with his father's decision to specifically limit his legacy under the will.")

participated in it in bad faith. ("...the petitioner's refusal to participate in this agreement cannot be used as a way to re-confer standing for him to continue to contest his legacy." Ap.A-52.) The Appeals Court also mentioned this. (Ap.B-67-68.)

However, the lower courts seem to have missed the fact that the agreement involved not only Peggy allowing Vincent and Lydia to choose from among the 48 paintings which she claimed were hers, but also it was agreed that Dr. Belz was to be deposed in order to find answers to questions about the propriety of the entire process of Dr. Belz's work in categorizing the paintings and Peggy's involvement with it.

Subsequently, according to the agreement, Dr. Belz was deposed.[27] This deposition revealed serious improprieties, as discussed above, both regarding the 14 paintings which Dr. Belz recategorized from non-major to major after Peggy resubmitted them to him[28] and also regarding the entire process and Peggy's involvement in it.[29] Thus it should not be surprising that Vincent did not seek to go ahead and reselect paintings as if nothing was wrong.

More misunderstandings and/or bias in the lower courts:

Judge Wilson wrongly implied that Vincent had provided to the Court selected excerpts of four deposition transcripts, seeking to withhold unfavorable portions of them. (Ap.A-42-43 [fn. 3-6].) This is completely incorrect because judge Wilson had previously explicitly stated that Vincent should only include pertinent portions of the transcript of Peggy's deposition (one of the transcripts in question) and not the whole thing. (MCA.Tr-113.) Regarding the other three transcripts, he apparently failed to recognize that they had

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[27] This deposition involved considerable expense since both Vincent's and Peggy's attorneys needed to travel 3 hours each way from Western Mass. up to Franconia NH to depose Dr. Belz.

[28] Note that these 14 paintings that dubiously got recategorized have never been made available for Vincent and Lydia to choose from.

[29] There is no allegation that Dr. Belz acted unethically or incompetently, only that he was unwittingly duped and manipulated.

already been included in the record in their entireties. (A1-58-166.) So judge Wilson's allegation of malfeasance regarding these transcripts is wrong. (MCA.Op.Br-18.)

Judge Wilson's Memorandum also states that Vincent filed a motion for preliminary injunction and that this motion was denied (Ap.A-38) but he fails to state that he initially found the motion meritorious enough that he granted a TRO on account of it on 2/26/03 (Ap.D-74-76) which ran for 16 days (through 3/11/03) and prevented the executrix from selling any paintings during a portion of a show of Greg's work, which ran from about March 4th through 31st.

His procedural history also states that Vincent sought reconsideration of the order denying the motion for preliminary injunction with several emergency and ex parte motions. He then writes that because of these repetitive motions he issued an order on 3/26/03 prohibiting and restraining Vincent from filing any more ex parte or emergency motions of any kind. (Ap.A-38.) However, he fails to explain, first of all, that Vincent filed only *one* ex parte motion and only *one* emergency motion (A1-11). He also fails to explain the context of these motions. The ex parte motion and the emergency motion were both seeking a TRO to prevent Peggy from selling paintings during a show of Greg's work until a motion for reconsideration of the order denying a motion for preliminary injunction could be considered. These two motions essentially sought the continuation of a TRO which judge Wilson had previously issued (pursuant to the motion for preliminary injunction) on 2/26/03 and which had ended on 3/11/03 (during the show). All this was going on during a show of Greg's work and the executrix had indicated that she was intending to sell Greg's painting in violation of the terms of Greg's wishes, without endeavoring to place them in museums. Vincent was greatly worried about this and that is why he filed the *one* ex parte motion and the *one* emergency motion seeking the TRO.

Also, Judge Wilson said that Peggy was doing a good job of following the decedent's wishes and in support of this he

argued that Peggy had arranged to have a show of Greg's work at the Nielsen Gallery coincide with another show of his work at the Fogg Art Museum (both are in Boston), and that she thereby was maximizing the viewing exposure of Greg's work during sales. (Ap.A-59.) This reflects another significant misunderstanding of a key portion of Greg's will. The will does *not* seek to maximize the viewing exposure of the works *during* sales. It seeks to maximize the viewing exposure of the works *after* their sales (as would happen if the paintings were sold to museums). (MCA.Op.Br-45.)[30]

IX) Conclusion:

For all of the above reasons, the petitioner requests that the Supreme Court grant this petition for writ of certiorari.

Date: February 21, 2007 Signed: Vincent Gillespie

Vincent Gillespie
Party in pro per

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[30] In a summary judgment motion the moving party (Peggy) must show that there are no material facts in dispute and that she is entitled to judgment as a matter of law. Only then can such a motion be granted. Hub Associates, Inc. v. Goode, 357 Mass. 449, 451 (1970). Graham v. Quincy Food Serv. Emp. Ass'n & Hosp., Lib., 407 Mass. 601, 603 (1990). A court must not engage in credibility determinations and cannot decide such a motion because, in its view, the non-moving party will be unsuccessful at trial. Attorney General v. Bailey, 386 Mass. 367, 370 (1982). "... all doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment." Bailey at 371. Despite these standards which lean heavily towards Vincent, the Probate Court failed to interpret the facts in a light favorable to him. (MCA.Op.Br-18-22.) (This may reflect bias by Judge Wilson.)

Similarly, for a reviewing court, all facts properly presented to the lower courts by the party opposing summary judgment must be assumed to be true and that party must be given the benefit of all favorable inferences that may be drawn from those materials. Graham at 603. Harrison v. Boston Financial Data Services, Inc., 37 Mass. App. Ct. 133, 136 (1994). However, the Mass. Appeals Court failed to do these things.

APPENDIX A

Judge Wilson's
Order Granting Summary Judgment
and
Memorandum Of Decision
On Motion For Summary Judgment
(A2-752)

COMMONWEALTH OF MASSACHUSETTS
The Trial Court
Probate and Family Court Department

HAMPSHIRE DIVISION **Docket No. 00P0296EP**

IN RE:	
ESTATE OF GREGORY GILLESPIE	ORDER

Upon the Motion for Summary Judgment, IT IS ORDERED THAT said Motion is hereby ALLOWED for the reasons stated in the Memorandum of Decision on Motion for Summary Judgment of even date.

IT IS FURTHER ORDERED THAT the Petition to Remove Fiduciary is hereby DISMISSED.

June 24, 2004
Date

s/_____
Honorable Geoffrey A. Wilson
Judge of Probate and Family Court

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COMMONWEALTH OF MASSACHUSETTS
The Trial Court
Probate and Family Court Department

HAMPSHIRE DIVISION **Docket No. 00P0296EP**

IN RE:	)
ESTATE OF GREGORY GILLESPIE	)

MEMORANDUM OF DECISION ON MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the Motion for Summary Judgment filed by Peggy R. Gillespie with respect to Vincent Gillespie's Petition for her Removal as the Executrix of the Will of Gregory Gillespie.

Peggy R. Gillespie (hereinafter "the executrix") moves for summary judgment on the grounds that no genuine issue of material fact exists, and that she is entitled to judgment as a matter of law; that Vincent Gillespie lacks standing to seek removal of the executrix; that the executrix has not breached her fiduciary duties to the estate; and that there is no reason for the Court to remove the executrix sua sponte. Vincent Gillespie opposes the Motion on the ground that questions of material fact exist which preclude Summary Judgment.

I. BACKGROUND

A. Procedural History

Gregory Gillespie, a prominent artist, (hereinafter "decedent") died on April 27, 2000 and a Petition for Probate of his last will and a codicil was filed by Peggy R. Gillespie on May 24, 2000. The will which was submitted had been executed on November 17, 1988 and the codicil on February 25, 1992.

The decedent's son, Vincent Gillespie, was served in-hand with notice of the Petition and an attorney entered an appearance on his behalf on June 20, 2000. However, no affidavit was filed pursuant to Probate Court Rule 16, contesting the will and/or the codicil. On July 13 2000, therefore, the will and codicil were allowed, and Peggy R. Gillespie, the surviving spouse of the [**p. 2] decedent and his nominated executrix[1], was appointed executrix, all without objection.

On August 30, 2002, Vincent Gillespie filed a Petition and Order to Render Inventory-Account, and on September 3, 2002 the Court (Rainaud, J.) issued an Order to the executrix to render an Inventory and Account of her administration of the estate on or before October 4, 2002. The executrix filed her Inventory on October 4, 2002, together with a Motion seeking additional time in which to file the Account. The Court issued an Order that the executrix file her account on or before February 28, 2003 (Wilson, J.; as well as all subsequent orders set forth herein).

On October 25, 2002, Vincent Gillespie filed a Motion for Reconsideration of the Order extending the time for the executrix to file her account. The executrix filed an

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[1] Ms. Gillespie is the step-mother of the petitioner and his sister, Lydia Gillespie Chiaminto

Opposition pursuant to Standing Order 2-99. The Motion to Reconsider was denied on November 21, 2002.

On November 18, 2002, Vincent Gillespie (hereinafter "petitioner") filed the instant Petition for Removal of Fiduciary and Appointment of himself as "successor executor" (hereinafter "the petition"). As grounds for removal, the petitioner alleged that the executor "(1) has ignored or overridden several provisions of the will; (2) has taken underhanded, corrupt actions resulting in harm to other beneficiaries of the estate and creditors; (3) has bad character and is held in disdain by people who know her, and (4) has demonstrated a complete lack of impartiality and is unsuitable for the discharge of said trust."

On December 10, 2002, an Appearance on behalf of the executrix was entered by her counsel in opposition to the petition. On December 23, 2002, the petitioner filed his own Appearance pro se with respect to this petition, and also filed a Request for Pre-Trial Conference.[2] Subsequent to filing his pre-trial request, the petitioner sought by motion to expedite the assignment of the pre-trial conference date. This motion was denied, after hearing on February 12, 2003.

On January 30, 2003, the executrix filed her First and Final Account indicating that all distributions from the estate of Gregory Gillespie had been made as of December 31, 2002. The Court issued a citation on the Account on February 24, 2003, with a return day of April 2, 2003.

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[2] His appearance indicates that it was on behalf of himself and his sister, Lydia Gillespie Chiaminto, but a Board of Bar Overseers (BBO) number is not listed on the form. On June 11, 2003, Attorney Kenefick, present counsel for the petitioner, filed an Appearance on behalf of Vincent Gillespie and Lydia Gillespie Chiaminto.

Also on February 24, 2003, the petitioner filed a Motion for Preliminary Injunction with supporting memorandum and exhibits. On March 5, 2003, the executrix filed an affidavit in opposition to the Motion as well as a Motion to Strike and Impound. A hearing was held on [**p. 3] March 6, 2003 with respect to the parties' motions. At that time, the petitioner was given until March 10, 2003 to file further material in support of his position. On March 11, the Court denied the motion to strike and impound, and by separate Order denied the petitioner's motion for a preliminary injunction, based upon a finding that the petitioner lacked standing, and was unable to demonstrate a substantial likelihood of success on the merits in his petition to remove the executrix.

Following the denial of his motion for preliminary injunction, the petitioner sought reconsideration of the Court's ruling, and attempted, unsuccessfully, to be heard on several emergency ex parte motions in March 2003. Indeed, because of his repetitive and duplicative ex parte filings, the Court entered an Order, on March 26, 2003, prohibiting and restraining the petitioner from filing any additional "emergency" or ex parte motions of any kind. On April 2, 2003, his motion for reconsideration was denied.

On March 26, 2003, the petitioner filed an Appearance and an objection to the allowance of the account filed on January 30, 2003.

On April 17, 2003, the executrix filed a Motion to Substitute First and Final Account filed January 30, 2003 with an amended Account dated March 26, 2003. The executrix sought to file the amended Account in order to reflect certain additions to the inventory and expenses paid that were not reflected in the original Account. On April 23, 2003, an Order issued scheduling this Motion for hearing at

the time of the Pre-Trial Conference scheduled for May 14, 2003. The Pre-Trial Conference was subsequently rescheduled by a Notice of Reassignment to June 11, 2003, at which time the Court allowed the Motion to Substitute.

On May 5, 2003, the petitioner filed another objection to the account, along with a preliminary statement of objections and a Motion for Leave to file Statement of Objections to Account Late. On May 14, 2003, an Order issued, after hearing, directing him to file his written objections to the amended account on or before May 27, 2003. The petitioner filed an Affidavit in Support of Objection to First and Final Account on the date specified by the Court.

On May 20, 2003, the executrix filed the present Motion for Summary Judgment, along with a memorandum of law and her affidavit. This Motion was marked for hearing at the time of the Pre-Trial Conference on June 11, 2003. The petitioner filed his Opposition to Motion for Summary Judgment and his affidavit, as well as exhibits in support of his position, at that hearing.

On June 11, 2003, by agreement of the parties, the Court entered an Order that "the forty eight (48) paintings which Ms. Gillespie asserts were transferred to her by the decedent during his lifetime as gifts shall be examined by Mr. Carl Belz and designated by him as either major or non-major works, whereupon Lydia M. Gillespie and/or Vincent Gillespie shall be allowed to choose any of the paintings so designated as non-major works towards the five non-major pieces each is entitled to receive pursuant to the terms of the decedent's will." In view of this effort to find means by which to resolve the controversy between the parties, the Court continued the Pre- [**p. 4] Trial Conference to August 27, 2003.

However this effort was not successful and on August 27, 2003, after hearing, the Court issued a Pre-Trial Order specifying that all discovery requests be served so that responses were due on or before October 31, 2003, whereupon discovery would be closed. Subsequently a further pre-trial conference was scheduled for November 19, 2003.

On November 13, 2003, the petitioner filed a Memorandum in support of the Court's Acting *Sua Sponte* to Remove Executrix, and, on November 19, 2003, filed a Supplemental Memorandum in Opposition to Summary Judgment. On November 26, 2003, the executrix filed a Memorandum in Response to Vincent Gillespie's Supplemental Memorandum. That same day, the petitioner filed a Motion for Leave to File a Revised Supplemental Memorandum, together with the proposed Revised Supplemental Memorandum. On December 17, 2003, the Court allowed petitioner's Motion in this regard.

On December 12, 2003, the petitioner filed a Motion for Leave to File Limited Reply to Executrix's Memorandum in Response and a Reply to Executrix' Memorandum in Response. On December 15, 2003, the executrix filed her Opposition to petitioner's Motion for Leave to File Limited Reply. On December 17, 2003, the Court allowed petitioner's Motion for Leave to File Limited Reply.

For purposes of the present Motion for Summary Judgment, in addition to the decedent's will and codicil, the Court has reviewed and considered all of the following:

Pleadings

(1) Vincent Gillespie's Petition for Removal of Fiduciary, filed November 18, 2002;

(2) Executrix's Motion for Summary Judgment, filed May 20, 2003;
(3) Memorandum of Law in Support of Motion for Summary Judgment, filed May 20, 2003;
(4) Affidavit of Peggy R. Gillespie in Support of Motion for Summary Judgment, filed May 20 2003;
(5) Petitioner's Opposition to Summary Judgment, filed June 11, 2003;
(6) Affidavit of Vincent Gillespie in Opposition to Summary Judgment, filed June 11, 2003 and Letter dated March 5, 2001 attached as exhibit 1;
(7) Petitioner's Memorandum in Support of the Court's Acting *Sua Sponte* to Remove the Executrix, filed November 13, 2003;
(8) Petitioner's Supplemental Memorandum and the exhibits attached in support, filed November 19, 2003;
(9) Executrix's Memorandum in Response to Vincent Gillespie's Supplemental Memorandum in Opposition to Motion for Summary Judgment and the exhibits attached in support, filed November 26, 2003;

(10) Petitioner's Motion for Leave to File Revised Supplemental Memorandum in [**p. 5] Opposition to Motion for Summary Judgment, filed November 26 2003;
(11) Petitioner's Revised Supplemental Memorandum in Opposition to Motion for summary Judgment, filed November 26 2003;
(12) Petitioner's Motion for Leave to File limited Reply to Executrix's Memorandum in Response to Vincent Gillespie's Supplemental Memorandum in Opposition to Motion for Summary Judgment, filed December 17 2003;
(13) Petitioner's Reply to Executrix's Memorandum in Response to Vincent Gillespie's Supplemental

Memorandum in Opposition to Motion for Summary Judgment, filed December 12, 2003;

(14) Executrix's Opposition to Motion for Leave to File Limited Reply to Executrix's Memorandum in Response to Vincent Gillespie's Supplemental Memorandum in Opposition to Motion for Summary Judgment, filed December 15, 2003.

Depositions

(1) The March 4, 2003 deposition of Peggy Gillespie, executrix[3];
(2) The February 7, 2003 deposition of Robert Fishko, Forum Gallery NY, NY[4];
(3) The February 5, 2003 deposition of Nina Nielsen, Nielsen Gallery, Boston, MA[5];

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[3] The petitioner filed this deposition as "Exhibit C" in conjunction with his Opposition to Summary Judgment, but only provided the Court with pages 1,5, 9-34, 38-57, 59-60, 62, 92, 94, 107, 113, 127-130, 133, 135, 137, 141, 148, 154, 159, 163, 174, 181, 183-184, 186-187, 189. The transcript filed with the Court ends with page 189 but in as much as the last line is a question, it is clear that this is not the final page. For whatever reason, the petitioner has chosen not to provide the Court with a complete transcript.

[4] Once again, the petitioner filed this deposition as "Exhibit E" in connection with his Opposition, but only provided the Court with pages 1, 7,11, 13-14, 16, 18-19, 24, 38, 43. At the end of page 43 is an answer which is apparently continued on the following page.

[5] The petitioner filed this deposition as "Exhibit F" in conjunction with his Opposition, and provided the Court with pages 1, 6, 10, 13-14, 27, 30.

(4) The February 5, 2003 deposition of John Baker, Nielsen Gallery, Boston, MA[6];
(5) The October 22, 2003 deposition of Carl Belz, Franconia, NH along with exhibits 1 through 9 marked for identification

B. Factual History

[**p. 6] For purposes of the motion, the Court finds that the following material facts are not contested:

Under the decedent's will, as amended by the codicil, Vincent Gillespie and his sister, Lydia Gillespie, have the following limited interest:

> FIRST: I give and bequeath five (5) non-major pieces of my artwork to each of my children LYDIA M. GILLESPIE and VINCENT J. GILLESPIE who shall survive me by thirty (30) days.
>
> For purposes of these gifts, I consider my major works of art to be those of extraordinary quality or museum caliber quality. The identification of my major works of art shall be made by a consultant of recognized authority, uninterested in this determination, and chosen by my executrix. Recognized authorities whom might be consulted for this purpose include Mr. Hugh Davies, who is the director of the LaJolla Art Museum, and Mr. Carl Belz, who is the director of the Rose Art Museum of

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[6] The petitioner filed this deposition as "Exhibit G" in conjunction with his Opposition, and provided the Court with pages 1, 15, and 18.

> Brandeis University. My estate shall pay the expenses incurred in making this determination.
>
> Once my major works have been identified, the beneficiaries named above shall choose their bequests from among my non-major works, determining among themselves, if possible, who shall take which non-major works. If my said beneficiaries cannot make such determination among themselves, they shall choose one non-major work at a time, with the order of their choices determined by the drawing of lots conducted by my estate's attorney. The beneficiaries shall complete their choices no later than six (6) months after the date on which my major works are identified. Once my said beneficiaries have chosen their bequests from among my non-major works, these gifts shall include any insurance coverage thereon. (Will, p.1)
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> ....
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> ....
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> ....
>
> FOURTH: I intentionally make no further provision in this, my will, for any child of mine or for any issue of any deceased children whether now or hereafter born. (Will, p.4)

The decedent left the remainder of his personal property, other than works of art, to his spouse, Peggy R. Gillespie, with some provision for his younger daughter Julianna M. Gillespie. (Will, p. 2). Further, as amended by the codicil, all of the artworks not bequeathed in article FIRST, as well as the residue and remainder of his estate, passed to Peggy Gillespie, Robin Freedenfeld, and Virginia Kaeser, as trustees of "The Gregory Gillespie Revocable Trust" (Will p.3 and Codicil, p.l).

The decedent left the following instructions in his will regarding the sale of his work as [**p. 7] follows:

> NINTH: If my executrix deems it advisable to sell any of my works of art such sales shall be made in consultation with the Trustee of the said GREGORY
> GILLESPIE REVOCABLE TRUST (and if my daughter JULIANNA MAY GILLESPIE should die without leaving issue who survive her by thirty (30) days during the administration of my estate then also in consultation with the Trustees of the Gregory Gillespie Foundation) so that an orderly program of sales may be established. During the course of my career and to this date I have employed Miss Bella Fishko as my sales agent and she has displayed my works of art at her gallery known as the "Forum Gallery" presently located at 1018 Madison Avenue, New York, New York. My executrix may or may not continue to use the services of Miss Fishko and the Forum Gallery. The program of sales shall be in accordance with the following guidelines:
>
> A. It is my primary intention that my works of art be sold to institutions or individuals that will permit the widest possible audience to view my works after their sale. Accordingly, my executrix shall endeavor to sell my works of art to museums, universities and other charitable organizations that will be able to place my works of art on public display. My executrix may also make sales to private collections, and in her discretion, my executrix may require certain commitments of public display as part of the negotiations for the sale of any of my works of art.

> B. It is also my intention that the sale of my works of art shall be made on a timely basis in light of public acceptance of, appreciation of, and demand for my works of art so as to maximize the sales price for each work of art sold. I understand that demand for my works of art may fluctuate, and, accordingly, I request that my executrix participate with the aforementioned Trustees to establish a flexible program of sales over a considerable period of time. (Will, p. 8). *[sic – this last sentence misquotes the will but it is printed as Judge Wilson wrote it.]*

The decedent named Peggy R. Gillespie as the executrix of his will. If she was unwilling, unable, or ceased to serve, Attorney William Hart was named as successor executor. (Will, p.7)

After the Petition for Probate of the decedent's will was filed on May 24, 2000, Vincent Gillespie's first counsel entered an Appearance on his and Lydia Gillespie's behalf on June 20, 2000. (Docket entry No. 8). That appearance stated that "No objections is made to the petition, but the petitioners wish an appearance to be filed on their behalf with regard to their beneficial interests in the will." (Docket entry No. 8). The will and codicil not having been contested, they were allowed on July 13, 2000, and Peggy R. Gillespie was appointed executrix. (Docket entry No.1).

In August of 2000, after being contacted by William Hart, an attorney for the executrix, Carl Belz agreed to perform the evaluation of the decedents artwork as mandated by article FIRST of the will. (See Deposition of Carl Belz, p. 22, line16 to p. 24, line 7 (hereinafter "Belz")). On August 11, 2000, Mr. Belz received copies of the will, the codicil, and a pictorial [**p. 8] inventory of the artwork in the decedent's studio. (Belz, 24:12 and deposition exhibit 1). He also received a copy of a memorandum by the executrix,

which listed forty-eight (48) works that were either not owned by the estate or were not to be sold right away. (Belz, 26:11-21, and exhibit 1).

On August 16, 2000, Mr. Belz received another pictorial inventory, this one of the decedent's artwork in the possession of the Forum Gallery in New York City, and he was asked by counsel for the executrix to include these works in his evaluation. (Belz, 25:12-22, 27:10-19, and exhibit 2). On August 22, 2000, Mr. Belz sent to Attorney Hart his initial classification of the decedent's works into the major or non-major categories. (Belz, 33:20-32:22 and exhibit 3).

This initial classification was followed, on August 30, 2000, by a list of nine artworks that Mr. Belz had reclassified as major from their prior non-major designation. (Belz, 48:2-18, and exhibit 4). After further reflection, Mr. Belz reclassified several additional pieces via a letter dated September 5, 2000. (Belz, 51:16-55:20 and exhibit 5). In this letter, he moved one work from major to non-major, and five other works from non-major to the major classification. (Id.) Finally, on September 26, 2000, after receiving photographic reproductions of five other pieces from the Nielsen Gallery in Boston, Mr. Belz also designated these artworks as non-major (Belz 64:16-66:9 and exhibit 7).

On March 5, 2001, pursuant to the six-month deadline established under the will, Vincent Gillespie selected the five non-major artworks that he wished to have pursuant to the term's of his father's will. He did so in writing to Attorney Hart stating: "I do so under protest. I am not abandoning my earlier claims." See Affidavit of Vincent Gillespie in Opposition to Summary Judgment, exhibit 1.

On February 7, 2003, the petitioner deposed Robert Fishko, owner of the Forum Gallery in New York City, which had represented the decedent from 1967 until his

death. (See Deposition of Robert Fishko, 7:10-17, 7:24-25 (hereinafter "RF")). Mr. Fishko testified that during the decedent's lifetime, there was an oral understanding regarding sales of his work. (RF, 11:10-24). The Forum Gallery held a memorial exhibition of the decedent's work and sold less than 10 paintings. (RF, 13:14- 14:4). He stated that the prices for the work in that exhibition were mutually agreed upon by the gallery and the estate. (RF, 16:8-25). Based on the decades long relationship between the decedent and the gallery, Mr. Fishko stated that the gallery was owed approximately $300,000 and that there was litigation with the estate to recover the debt. (RF, 24:6-25). Finally, Mr. Fishko testified regarding the appraisal of the estate and the fact that there was a disagreement regarding the appraisal. (RF, 43:5-25).

On March 4, 2003, the petitioner deposed the executrix, whereupon she testified at length as to the facts and circumstances surrounding the decedent's gifting of the forty-eight (48) artworks to herself and her daughter. (See Deposition of Peggy Gillespie, 9:22-60:14 (hereinafter "PG")). She stated that, with regard to the litigation with the Forum Gallery, she followed the advice of counsel on how to proceed. (PG, 107:3-11). She stated that she had discussions with Carl Belz regarding the work because of the quality of some of the photographs provided to him but that she did not attempt to influence his decisions. (PG, 127:13-130:24). She acknowledged [**p. 9] trading art for services to the estate, including legal work, but stated that this was due to a lack of available cash to pay for those same services. (PG, 181:11-22, 183:1-184:21). She also stated that all of the people who received art for services agreed to loan the work to any museum shows. (PG, 184:22-24). Regarding the appraisal of the estate by Robert Fishko, she explained her concern over using too low a figure and running afoul of the IRS to the detriment of the estate. (PG, 186:10-187:15).

Subsequent to the agreement of the parties of June 11, 2003, recounted in the procedural history supra, Mr. Carl Belz was again retained; this time to classify the forty-nine (49) paintings previously excluded from his initial evaluation in August 2000.[7] (Belz, 70:8-71:8 and exhibit 8). On July 24, 2003, Mr. Belz sent his list to counsel for the executrix, separating the previously excluded works into the requisite major/non-major categories. (Belz, 72:1-12 and exhibit 9).

The petitioner deposed Mr. Carl Belz on October 22, 2003. At that time, Mr Belz testified that, while he did move some artwork from the non-major to the major category after his initial assessment, this was due to his personal rethinking of the work and the legacy of the decedent (Belz, 48:2-50:23, 53:1-55:12, 61:14-62:23, 65:11-66:9, 81:8-85:14), and not due to any outside influence on the part of the executrix or other interested parties (Belz, 51:2-15, 58:14-21, 87:18-88:9). He also stated that he did not know which paintings the petitioner or his sister wanted when he was classifying the artwork. (Belz, 60:14-61:4). Mr. Belz testified that he understood his role as benefitting the estate and the legacy of the decedent (Belz, 41:14-42:3, 75:1-77:17, 86:5-87:17). He expressed his opinion that the executrix was doing a good job as demonstrated by her choosing the Salander O'Reilly gallery in New York City to show the decedent's artwork and obtaining a grant to document the artwork. (Belz, 42:8-47:2).

II. DISCUSSION

A. Summary Judgment Standard

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[7] By a letter dated July 17, 2003, counsel for the executrix indicated to Mr. Belz that there were actually forty seven (47) paintings which belonged to the executrix, plus an additional two (2) paintings that were somehow not included originally. See Carl Belz Deposition, exhibit 8.

Summary Judgment is appropriate "...if the pleadings, depositions, answers to interrogatories, and requests for admission...together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c).

The moving party has the burden of proving that there is "no genuine issue of fact on every relevant issue raised by the pleadings." Kourouvacilis v. General Motors Corp. 410 Mass. 706, 711 (1991). The burden on the moving party may be met by showing that there is an absence of evidence to support the non-moving party's case, or by demonstrating that proof of an essential [**p. 10] element of the non-moving party is unlikely to be forthcoming at trial. Id. Furthermore where there is a complete failure of proof concerning an essential element of the non-moving party's case, all other facts are rendered immaterial. Id.

On the other hand, summary judgment must be denied when, viewing the evidence in the light most favorable to the non-moving party, there exist genuine issues of material fact or the moving party is not entitled to judgment as a matter of law. Golub v. Milpo, Inc., 402 Mass. 397, 400 (1988). If there is doubt as to the existence of a genuine issue of material fact that doubt must be resolved in favor of the non-moving party. Attorney General v. Bailey, 386 Mass 367, 371 (1982).

However, even though the Court must view the evidence in the light most favorable to the non-moving party, that party may not rest on his pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. LaLande v. Eissner, 405 Mass. 207, 209 (1989).

B. The Petitioner Lacks Standing as an Individual to Seek Removal of the Executrix

Generally, individuals have standing to litigate matters only where they have an interest in the matter affecting their liberty, rights or property. Hogarth-swann v. Weed, 274 Mass. 125, 132 (1931); Razin v. Razin, 332 Mass. 754 (1955); Clymer v. Mayo, 393 Mass. 754, 763 (1985). Initially, a legatee has an interest in the competence and suitability of the executor, and therefore has standing to dispute the executor's appointment. Gay v. Richmond, 9 Mass. App. Ct. 334, 337 (1980). However, after receiving his legacy, the legatee loses standing by virtue of receive the interest due to him from the estate. Id. at 337 n.4.

The petitioner is a legatee under the will of Gregory Gillespie, which was allowed without contest, and with no objection having been raised by the petitioner as to the appointment of the executor. On March 5, 2001, the petitioner selected the five non-major artworks which were his specific bequest under the will. He did so "under protest" at the time due to his opinion that he did not have the opportunity to select from all of the artwork which should have been designated non-major.

The petitioner contends that Carl Belz, the recognized authority specifically named by the decedent as being among those qualified to categorize his artwork, was somehow unduly influenced by the executrix or otherwise made his designations without full knowledge of his role. However, the uncontroverted deposition testimony of Mr. Belz indicates that he did not know which artworks the petitioner or his sister desired, he did not make his determinations based on the executrix's wishes, and he considered his role to be benefitting the estate and legacy of the decedent.

Furthermore, by agreement of the parties on July 11, 2003, 49 artworks which were not included in the original designations by Mr. Belz were also submitted for categorization. This expanded the pool of available choices for the petitioner and his sister, despite the that each had already made their five selections, and represented an attempt by the executrix to address the [**p. 11] petitioner's claim that his original selection was "under protest" due to a limited universe of choices. However, despite seeking and agreeing to this expansion of choices, the petitioner has now refused to make any new selections. After his lack of standing has been raised by both the Court and the executrix, the petitioner's refusal to participate in this agreement cannot be used as a way to re-confer standing for him to continue to contest his legacy.

The petitioner argues that he continues to have standing to remove the executrix because I there are still paintings designated by Carl Belz as major works which are "unjustly inaccessible" to him. But this argument ignores the fundamental fact that the decedent specifically intended for the petitioner to receive only five non-major artworks and to not have the option of choosing any major artwork. The petitioner's real disagreement therefore appears to be with his father's decision to specifically limit his legacy under the will.

The executrix implemented the decedent's plan by contacting Mr. Belz and providing him with the documentation necessary for the evaluation of the artwork. Carl Belz then acted according to the wishes of the decedent by categorizing the artwork and thereby placing some artwork beyond the reach of the petitioner. This process was according to the will of the decedent which was allowed without objection from the petitioner. While it is true that the petitioner is a legatee under the will, the specific bequest which is his only interest would not be affected by the

removal of his step-mother as the executrix. Therefore he does not hold an interest affecting his rights or property in this matter which would confer standing upon him to seek her removal.

C. The Petitioner Lacks Standing on Behalf of the Public

A charitable gift is defined "as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." Jackson v. Phillips, 14 Allen (96 Mass.) 539, 556 (1867). Unless otherwise provided for in a written instrument, a gift made for a public charitable purpose shall be deemed to have been made with a general intention to devote the property to public charitable purposes. G. L. c. 12, § 8K. If the gift is for a public charitable purpose, the attorney general has a duty to enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof. G. L. c.12 §8.

An individual, in limited circumstances, may assert standing on behalf of the public to seek enforcement of a public duty under the "public right doctrine." Tax Equity Alliance for Massachusetts v. Commisioner of Revenue, 423 Mass. 708, 714 (1996). The public right doctrine stands for "the principle that where a public officer owes a specific duty to the public to perform some act or service not due the government as such or to administer some law for the public benefit which he is refusing or failing to perform or administer any member of the public may compel by

mandamus the performance of the duty required by law." Kaplan v. Bowker, 333 [**p. 12] Mass. 455, 460 (1956).

Here, as the attorney general has declined the petitioner's request to intervene in this action[8], he now contends that he has standing "in the public interest" to seek removal of the executrix because of the charitable nature of the will of the decedent. To support his claim he selectively emphasizes portions of article NINTH of the will, rather than considering the entire provision. See article NINTH, supra at I(B).

It is not surprising that the Attorney General has apparently declined the petitioner's invitation to intervene to enforce the alleged "public charitable" intent of the decedent, as there is no charitable gift purporting to be for the public contained within the will. See Jackson v Phillips, 14 Allen (69 Mass.) 539, 556 (1867). The will is not for the indefinite benefit of a number of persons but rather for the benefit of the decedent's surviving spouse and their daughter. Thus, the attorney general owes no duty to the public to act where, as here, there is only a private purpose to the will.

In article NINTH, the decedent made clear the private, non-charitable intent of his estate plan in that (1) the executrix has the ultimate discretion whether to sell any artwork at all; (2) if she does find it advisable to sell artwork, she is to engage in an orderly program of sales in consultation with the trustees; (3) the executrix is free to engage the services of any gallery to effectuate the sales; (4) although the decedent's intent is for the widest possible audience for his artwork, the executrix has complete discretion whether to require commitments of public display

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[8] See Petitioner's Supplemental Memorandum, page 5, and Affidavit of Mary H. Patryn attached thereto.

for the sale of any artwork; (5) the decedent emphasized his desire that the maximum sales price for his work be realized by timing sales with demand; and (6) to maximize the sales price, the flexible program of sales is to occur over an extended period.

The Gregory Gillespie Revocable Trust is not before this Court on this petition to remove the executrix. However, the trust is obviously related to these proceedings in that the works of art are to ultimately become the property of the trust. The beneficiaries of the trust are the surviving spouse, executrix, and trustee Peggy Gillespie, and her daughter, Julianna Gillespie. The existence of this trust in the estate plan of the decedent indicates that the so-called "orderly program of sales" and the related efforts to maximize the sales price of the artwork are intended to fund the trust for their benefit. Public display is emphasized as the mechanism for maximizing the visibility of the artwork and thereby increasing the sales price of the work. Maximum public exposure, appreciation, and demand increases the benefit to Peggy and Julianna Gillespie under the trust because the artwork will bring greater sales prices. The over-riding intent of the will is to benefit these two individuals rather than the general public. Thus, there is no public interest or charitable intent here and the petitioner cannot assert standing under the public right doctrine.

[**p. 13] The petitioner urges the Court to consider the case of Kapiolani Park Preservation Society v. City and County of Honolulu, 751 P.2d 1022 (Hawaii 1988) for the proposition that members of the public have standing as beneficiaries to challenge the decisions of a public charitable trust. But this decision does not advance the petitioner's position, as this case involved a public park in the city of Honolulu that was originally created and maintained through a expressly public charitable trust with the city as trustee. Nothing of this nature is involved with the decedent's will in

the present instance. As already discussed, in this commonwealth, under the "public right doctrine", the general public could have standing to enforce a public charity. However, the decedent's will did not create a public charity for the benefit of the general public and the attorney general has no duty as a public officer to act to enforce the alleged charitable intent. If this were a situation where the decedent funded a museum, for example, for the benefit of the public, then perhaps this Hawaii case would offer some guidance.

D. There is Insufficient Evidence for the Court to Act Sua Sponte

The petitioner alleges in his petition for removal that the executrix "(1) has ignored or overridden several provisions of the will; (2) has taken underhanded, corrupt actions resulting in harm to other beneficiaries of the estate and creditors; (3) has bad character and is held in disdain by people who know her, and (4) has demonstrated a complete lack of impartiality and is unsuitable for the discharge of said trust." When the Court determined the petitioner lacked individual standing to seek removal of the executrix (See Order of March 11, 2003), he then asserted that under the circumstances the Court was justified, if not required, in removing the executrix *sua sponte*.

A Probate Court has the authority to remove an executrix if she is "unsuitable" for the office. G. L. c. 195, § 11. Unsuitability has been defined as "Past maladministration of a comparable trust, bad character, misconduct, neglect of duty, or physical or mental incapacity,... the existence of an interest in conflict with his duty, or a mental attitude toward his duty or toward some person interested in the estate that creates reasonable doubt whether the executor or administrator will act honorably, intelligently, efficiently, promptly, fairly and dispassionately in his trust... [or] ...

continuance in office will be likely to render the execution of the will or the administration of the estate difficult, inefficient or unduly protracted." Quincy Trust Co. v. Taylor, 317 Mass. 195, 196-197 (1944). The Court may act sua sponte to remove an executrix where a petitioner lacks standing and there is evidence establishing the "obvious unsuitability" of the executrix. Id.at 198; Clymer v. Mayo, 393 Mass. 754, 763 (1985); District Attorney for the Norfolk District v. Magraw, 417 Mass. 169, 171 (1994).

In Quincy Trust Co. v. Taylor, supra, without even reaching the issue of standing, the Supreme Judicial Court found the executrix to be unsuitable because she had done absolutely nothing to administer the terms of the will, had failed to keep any accounts, and had engaged in an unauthorized property conveyance to the detriment of the estate. Characterizing this conduct as "utter neglect", the Court found that the decision to remove her for her unsuitability was appropriate, notwithstanding the petitioner's lack of standing. Id.

[**p. 14] By contrast, in Clymer v. Mayo. supra at 163, the parents of the decedent could not maintain their petition for removal of the administrator because they lacked standing due to the existence of a valid pour-over trust for the residuary of the estate. In considering whether *sua sponte* removal was appropriate, in that instance, the Court distinguished the parents' reliance on Quincy Trust Co. by virtue of the fact that they had produced no evidence to support their charges of misconduct, nor did their briefs and arguments allege facts justifying the court to act on its own. Id. Thus, the dismissal of the petition for removal was affirmed. Id.

More recently, in District Attorney for the Norfolk District v. Magraw, supra, a district attorney petitioned for

removal of an executor who was both the husband of the decedent and a suspect in her murder. Id. at 174. In the pending criminal investigation, the District Attorney sought information from the decedent's attorney and psychotherapist but the executor refused to waive the attorney-client and psychotherapist-patient privileges. Id. The Court concluded that this constituted an "obvious conflict of interest" in that the executor, as a suspect in his wife's death, had an interest in keeping from law enforcement officials any information which had the possibility of inculpating him. Id. Turning to the definition of unsuitability set forth in Quincy Trust Co., the Court found that the existence of these conflicting interests "certainly "creates reasonable doubt" that he honestly, fairly, and dispassionately could execute his responsibilities as executor of his wife's estate." Id. Therefore, removal of the executor on these facts was required. Id.

Here, the evidence presented by the petitioner which he claims demonstrates the unsuitability of the executrix - much of which has already been discussed above - falls far short of the proof which would justify *sua sponte* removal by this Court. He alleges that the executrix (1) has a conflict of interest with her fiduciary duties in that she believes the purpose of the estate plan is to provide her with income instead of "propagat[ing] a widespread appreciation for [the decedent's art]"(Opposition to Summary Judgment, p. 12); (2) has claimed 48 paintings as her own and thus has a conflict of interest (Opposition, p. 13); (3) has a "substantial animus" against the petitioner and his sister which is demonstrated by her narrowing the pool of choices of the decedent's work (Opposition, p. 13); (4) has failed to execute the terms of the decedent's will in that she has not promoted his work and has traded art for services (Opposition, p. 13); (5) has not informed the Forum and Nielsen Galleries of the terms of the will (Opposition, p. 14); (6) has only placed two paintings in museums (Opposition, p. 14); (7) has failed to

conduct a "program of sales" pursuant to the terms of the will. (Opposition, p. 14); and (8) has destroyed the estate's relationship with the Forum Gallery due to litigation over the debt owed by the estate (Opposition, p.15).

However, there is actually substantial evidence of the suitability of the executrix. She was chosen by the decedent and duly appointed by the Court. See Grossman v. Grossman, 343 Mass. 565, 568 (1962). Unlike the executrix in Quincy Trust Co., she has not neglected her duty, as demonstrated by her timely probating of the will, and filing two inventories and accounts. She is also implementing the terms of the decedent's will and, in particular, the so-called "program of sales." She arranged for a show of the artwork at the Salander O'Reilly Gallery and a December 2003 exhibit at the Fogg Art Musuem at Harvard University. (Memorandum in Response to [**p. 15] Supplemental Memorandum in Opposition, exhibit A and B). In addition, the Nielsen Gallery in Boston showed the decedent's artwork, timed to coincide with the Fogg Art Museum show. (Memorandum in Response, exhibit A). This arrangement comports with the wishes of the decedent to sell work when there is maximum public exposure and demand.

Additionally, while the petitioner alleges that the exclusion from the estate of 48 paintings by the executrix constitutes some form of conflict of interest, he offers no additional proof or authority for his position. His allegation of "substantial animus" towards him and his sister based on the executrix's "narrowing" of the pool of choices of works again fails to recognize that the decedent established the mechanics of the designation of their specific limited legacy, and that Carl Belz conducted the categorizing of the work as laid out in the will. The executrix implemented the mechanism by which the legacy was to be identified. Evidence of her "animus" is lacking, particularly in light of the fact that she entered into an agreement with the petitioner

to include previously excluded work, even though she claimed that it was not the property of the estate.

The petitioner also alleges unsuitability due to the executrix's failure to inform the galleries of the terms of the will as well as destroying the pre-existing relationship with the Forum Gallery. The decedent's will contains no requirement that the galleries be provided with the terms of the will. Likewise, the decedent did not require the executrix to continue the relationship with the Forum Gallery. In fact, in article NINTH, the decedent specifically states: "My executrix may or may not continue to use the services of Miss Fishko and the Forum Gallery." There is also no requirement in the will that works be placed in museums. As discussed above, the executrix has sole discretion whether to sell any work at all. If she does choose to sell, the will gives her discretion as to whether to require commitments of public display. There is no requirement in the will that a certain number of works be donated or sold to any museum.

Finally, unlike District Attorney for the Norfolk District, the executrix's duty as a fiduciary and her personal interests are not in conflict under these circumstances. The clear intent of the estate plan is to fund the trust and provide income to the beneficiaries. This intent is to be realized by maximizing exposure of the decedent's work and thereby maximizing the sales prices. As both fiduciary and beneficiary of the trust, the interests of the executrix are in harmony. As fiduciary, she is charged with faithfully executing the will of the decedent to maximize the exposure and the price for his work. As beneficiary, her personal interest is for the work to receive maximum exposure so that the trust will receive as much income as possible from the sales of the work.

As a result, even when viewed in the light most favorable to the petitioner, this evidence does not justify *sua sponte* removal. No valid reason has been given to doubt that the executrix has, and will, continue to "act honorably, intelligently, efficiently, promptly, fairly and dispassionately in [her] trust". Quincy Trust Co. v. Taylor, supra at 197. Nor has the administration of the estate been rendered more difficult or unduly protracted by the executrix's acts. Id. To the contrary, the difficulty and delay have been due to the acts of the petitioner.

[**p. 16] Ultimately, the will gives the executrix a considerable degree of latitude in performing her fiduciary duties, even when one considers the guidelines for selling the works of art which the petitioner invokes selectively to second-guess her decisions. The decedent specifically named his wife to be the person to carry out his wishes by administering his estate. The fact that the petitioner emphatically disagrees with her decisions is not enough to rise to the level of unsuitably justifying *sua sponte* action by this Court.

III. CONCLUSION

For the foregoing reasons, there being no genuine issue as to any material fact and an absence of evidence to support the essential elements of the petitioner's case, the executrix, Peggy Gillespie is entitled to judgment as a matter of law. Accordingly by separate order, the Motion for Summary Judgment shall be allowed and the Petition to Remove Fiduciary dismissed.

June 24, 2004
Date

s/_____
Honorable Geoffrey A. Wilson
Judge of Probate and Family Court

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APPENDIX B

Memorandum and Order of the Massachusetts Appeals Court

Commonwealth of Massachusetts
Appeals Court for the Commonwealth
At Boston,

In the case no. 05-P-1444

VINCENT GILLESPIE

vs.

PEGGY R. GILLESPIE, executrix.

Pending in the Probate & Family
Court for the County of Hampshire

Ordered, that the following entry be made in the docket:

Judgment affirmed.
Orders dated June 30,
2005, and August 17,
2005, denying post judgment
motions affirmed.

By the Court,

s/_____, Clerk

Date August 14, 2006.

NOTE:
The original of the within rescript
will issue in due course, pursuant
to M.R.A.P.23

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

05-P-1444

VINCENT GILLESPIE

vs.

PEGGY R. GILLESPIE, executrix.[9]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Vincent Gillespie (Vincent), appeals the summary judgment granted by a judge of the Probate and Family Court in favor of the defendant, Peggy R. Gillespie (Peggy or executrix). Vincent claims that the judge erred by concluding that he lacked standing to sue for the removal of the executrix and that the executrix was not competent and should have been removed from that position by the court, sua sponte. We affirm.

On appeal, we review the grant of a motion for summary judgment to evaluate whether, when viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as matter of law. See Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974); Gray v. Giroux, 49 Mass. App. Ct. 436, 438 (2000). When reviewing a summary judgment granted in favor of the defendant, the appellate court must assume the truth of all facts the plaintiff properly presented to the trial court and the plaintiff is

[9] Of the estate of Gregory Gillespie.

entitled to any favorable inferences that may be [**p. 2] drawn from these materials. Harrison v. Boston Fin. Data Servs. Inc., 37 Mass. App. Ct. 133, 136 (1994). However, a plaintiff's conclusory statements, general denials, and factual allegations, which are not based on personal knowledge, are insufficient to overturn the granting of a motion for summary judgment. Cullen Enterprises, Inc. v. Massachusetts Property Ins. Underwriting Assn., 399 Mass. 886, 890 (1987). In addition, we may affirm summary judgment on any grounds supporting the trial judge's ruling. Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991).

Facts. Gregory Gillespie (decedent), a prominent artist, died on April 26, 2000. His wife (Peggy), their daughter (Julianna), and two adult children from a previous marriage (Vincent and Lydia), survived him. In a will which was executed on November 17, 1988, the decedent named Peggy as the executrix. The will was allowed for probate without objection.

In the first article of the will, the decedent provided that each of his two adult children, Vincent and Lydia, would be able to select five of his nonmajor artworks of their choosing. Carl Belz, an art expert specified in the will, divided the decedent's artwork into major and nonmajor categories. At the request of the executrix, Belz reconsidered his initial classification and reclassified an additional fourteen pieces into the major category, thereby further limiting Vincent's selection. The [**p. 3] executrix further limited Vincent's selection of artwork by claiming that an additional forty-eight paintings were given to her by the decedent during his lifetime as gifts. Vincent selected his five pieces, stating that he was doing so "under protest."

The remainder of the paintings were to pass to the executrix, as trustee of a separate trust. The decedent further directed in his will that works of art sold should be sold so as to permit the widest possible audience and that the executrix should try to sell his works of art to museums, universities,

and other charitable organizations that would be able to put his work on public display.

On November 18, 2002, Vincent filed a petition for removal of Peggy as the executrix of his father's will on the grounds that she had ignored several provisions of the will, taken corrupt actions to harm other beneficiaries, possessed poor character, and demonstrated lack of impartiality. On June 24, 2004, a judge of the Probate and Family Court granted the defendant's motion for summary judgment.

Standing. Vincent argues that the judge erred in concluding as matter of law that he did not have standing to petition for the removal of Peggy as executrix. The judge concluded that Vincent ultimately lacked standing to challenge the competency of the executrix when his legacy became satisfied. We agree. [**p. 4] Because a legatee has an interest in the competence and suitability of the executor, legatees have standing to challenge the executor's appointment and to petition for removal. However, after receiving the legacy, the legatee no longer has standing since his legacy has already been fulfilled. See Gay v. Richmond, 9 Mass. App. Ct. 334, 337 n.4 (1980). Thus, though Vincent initially had standing to challenge the appointment of Peggy as executrix, he lost his standing to do so once his legacy had been fulfilled.

Vincent argues that his legacy was not actually fulfilled because he was not permitted a full selection of nonmajor works to choose from. We disagree. When challenged about the forty-eight paintings she claimed as gifts from the decedent during his lifetime, the executrix made those paintings available to Vincent and Lydia for their selection. Vincent declined to re-select his paintings. He was thus given a full opportunity to chose from among those paintings he initially claimed had been withheld from him. In addition, Belz's undisputed testimony indicates that his reclassification of fourteen paintings into major status was not the result of the executrix's improper influence. There is thus no genuine issue of material fact that Vincent's legacy

had been fulfilled and as such he lacked standing as a legatee to petition the court for the removal of the executrix. He could not maintain his "protest" under these [**p. 5] circumstances and his failure to make a choice from the expanded number of paintings amounted to a satisfaction of his legacy.

The probate judge also correctly concluded that Vincent lacked standing on behalf of the public to petition for the removal of the executrix. Vincent claims that due to the charitable nature of the decedent's will and the Attorney General's failure to intervene, he has standing on behalf of the public to petition for the removal of the executrix. Cf. Tax Equity Alliance for Mass. v. Commissioner of Rev., 423 Mass. 708, 714-715 (1996) (in limited circumstances, an individual may assert standing on behalf of the public to enforce a public duty). Although there is language in the decedent's will indicating that he sought the widest possible audience for his work, the will as a whole is clearly designed to benefit Peggy and Julianna. In the will, the executrix has discretion as to whether to sell any artwork at all and the executrix has discretion to require commitments of public display as part of the sale of any artwork. The decedent indicates that sales of artwork should be timed so as to take maximum advantage of demand. Furthermore, the works of art named in the will are to become the property of the Gregory Gillespie Revocable Trust, of which Peggy and Julianna are the beneficiaries, and the proceeds from the sale of artwork go to the trust. Therefore, the judge did not err in concluding that the primary intent of the will was [**p. 6] to benefit Peggy and Julianna rather than the general public. See Weaver v. Wood, 425 Mass. 270, 275 (1997) (will is charitable in nature if designed to benefit not one or two individuals but devoted to purposes that are beneficial to a broader community). As such, the public has no interest in the will and Vincent cannot assert standing on behalf of the public to petition for the removal of the executrix.

Qualification of executrix. There was also no genuine issue of material fact as to the executrix's competency. Where a petitioner lacks standing, a court may act sua sponte to remove an executor when there is sufficient evidence establishing the obvious unsuitability of the executor. See Quincy Trust Co. v. Taylor, 317 Mass. 195, 196 (1944). Vincent did not present sufficient evidence to support a sua sponte removal of the executrix. The cases where sua sponte action is appropriate involve severe misconduct on the part of the executor. See Id. at 196-197 (executrix may be removed where she failed to administer the terms of the will and made an unauthorized property conveyance to the detriment of the estate); Clymer v. Mayo, 393 Mass. 754, 763 (1985). In the present case, Vincent claims that the executrix should have been removed because she had a conflict of interest, had an animus against two other beneficiaries, and had not met certain provisions of the will. However, these allegations were not supported by evidence in the [**p. 7] record. Any theoretical conflict of interest due to the status of the executrix as a person taking under the will was not borne out by the evidence.

3. Postjudgment motions. Finally, Vincent argues that the judge erred in denying his motion for relief from judgment pursuant to Mass.R.Civ.P. 60(b)(2) and (6), 365 Mass. 828 (1974), or motion for reconsideration. Such motions are reviewed on appeal under an abuse of discretion standard. See Cullen Enterprises, Inc. v. Massachusetts Property Ins. Underwriting Assn., 399 Mass. at 894; Raheman v. Raheman, 59 Mass. App. Ct. 915, 916 (2003). In his rule 60(b) motion, Vincent did not present sufficient new evidence to warrant the granting of his motion for relief from judgment. See Wojicki v. Caragher, 447 Mass. 200, 213-215 (2006) (newly discovered evidence insufficient to warrant new trial where the evidence was previously discoverable and not so important as to make a different outcome likely); Dray v. Vardenski, 4 Mass. App. Ct. 861, 862 (1976). The judge did not abuse his discretion in

denying Vincent's motion for relief from judgment. See Murphy v. Administrator of [**p. 8] the Div. of Personnel Admin., 377 Mass. 217, 228 (1979).

Judgment affirmed.

Orders dated June 30, 2005, and August 17, 2005, denying post judgment motions affirmed.

By the Court (Kantrowitz, Berry & Doerfer, JJ.),

s/_____

Clerk

Entered: August 14, 2006.

APPENDIX C

The Massachusetts Supreme Judicial Court's Notice Of Denial of Application For Further Appellate Review

JOYCE CORONA

From: SJCCommClerk@sjc.state.ma.us
To: "Thomas A. Kenefick III, Esquire" tak3@att.net
Sent: Thursday, November 02, 2006 4:00 PM
Subject: FAR-15719 – Notice: FAR denied

Supreme Judicial Court for the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-724
Telephone 617-557-1020, Fax 617-557-1145

RE: Docket No. FAR-15719

PEGGY R. GILLESPIE
vs.
VINCENT GILLESPIE

Hampshire Probate & Fam No. 00P0296EP
A.C. No. 2005-P-1444

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 11/02/06, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: November 2, 2006

To: David R. Kaplan, Esquire
Thomas A. Kenefick, III, Esquire

This e-mail notice is being sent to you as part of a pilot program being conducted by the SJC Full Court Clerk's office. Under the program, notices will be sent by e-mail to those whose e-mail addresses have been provided to the Clerk's office. During the pilot program, a copy of the notice will also be sent to you by regular mail. If you have any comments about this e-mail notification, please let us know. If you would prefer not to receive such e-mail notices, please notify us at the above e-mail address. Thank you.

APPENDIX D

Judge Wilson's Order Granting a Temporary Restraining Order which prevented Peggy from selling any paintings during part of a show of Greg's work

(A1-184)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY DEPARTMENT

HAMPSHIRE DIVISION **Docket No.** 00P0296EP

In the Matter of)
the Estate of:)
) ORDER
)
GREGORY GILLESPIE)

After hearing on February 26, 2003 at which Vincent Gillespie was present and unrepresented as well as David R. Kaplan, Esquire, counsel of record for the executrix, Peggy Gillespie, IT IS ORDERED THAT:

1. No deposition of Julianna Gillespie shall take place prior to counsel being in place for Julianna, as she is a minor.

2. Peggy Gillespie shall make herself available to be deposed no later than March 4, 2003.

3. While the show presently scheduled to open in New York City on or about March 4, 2003 may proceed as planned, the Estate of Gregory Gillespie is restrained from transferring any assets of the estate; and/or from entering into any binding contractual obligations in that regard until further order of this Court.

4. The Motion of Vincent Gillespie for Preliminary Injunction filed February 24, 2003 will be heard on **THURSDAY, MARCH 6, 2003 at 2:00 P.M.**

February 26, 2003
Date

s/_____
Honorable Geoffrey A. Wilson
Judge of Probate and Family Court

APPENDIX E

The Will and Codicil
(A1-17)

I, GREGORY GILLESPIE, of Belchertown, Hampshire County, Massachusetts, declare this instrument to be my last will and testament, hereby revoking all previous wills and codicils made by me.

FIRST: I give and bequeath five (5) non-major pieces of my artwork to each of my children LYDIA M. GILLESPIE and VINCENT J. GILLESPIE who shall survive me by thirty (30) days. In addition, I give and bequeath one (1) non-major piece of my artwork to my former wife, FRANCES C. GILLESPIE, if she survives me by thirty (30) days.

For purposes of these gifts, I consider my major works of art to be those of extraordinary quality or museum caliber quality. The identification of my major works of art shall be made by a consultant of recognized authority, uninterested in this determination, and chosen by my executrix. Recognized authorities whom might be consulted for this purpose include Mr. Hugh Davies, who is the director of the LaJolla Art Museum, and Mr. Carl Beltz, who is the director of the Rose Art Museum of Brandeis University. My estate shall pay the expenses incurred in making this determination.

Once my major works have been identified, the beneficiaries named above shall choose their bequests from among my non-major works, determining among themselves, if possible, who shall take which non-major works. If my said beneficiaries cannot make such determination among [**p. 2] themselves, they shall choose one non-major work at a time, with the order of their choices determined by the drawing of lots conducted by my estate's attorney with a separate order so determined for the second, third, fourth and fifth works of art to be chosen by my said children. The beneficiaries shall complete their choices no later than six (6) months after the date on which my major works are identified. Once my said beneficiaries have chosen their bequests from among my non-major works,

these gifts shall include any insurance providing coverage thereon.

SECOND: I give the remainder of my tangible personal property other than my works of art that pass under Article THIRD below as part of my residuary estate, together with any insurance providing coverage thereon, to my wife, PEGGY ROGGENBUCK GILLESPIE, if she survives me by thirty (30) days. If my said wife does not so survive me, I authorize my executor to sell said tangible personal property and to add the proceeds of such sale to the residue of my estate, provided, however that if my daughter JULIANNA MAY GILLESPIE, whether or not she is legally *[the words "G.G. KS KSH" have been typed in at the left margin here]* adopted by me at my death, wishes to keep any of said tangible personal property, or if she is a minor, if my executor deems it advisable to distribute any of said tangible personal property to her, I authorize my executor to distribute to her so much of said tangible personal property together with any insurance providing coverage thereon as my executor deems advisable. The decision of my executor as to the items to be given to my said daughter shall be final.

[**p. 3] THIRD: Any and all works of art created by me and owned by me at my death and not bequeathed in Article FIRST above shall pass as a part of my residuary estate under this Article THIRD of my will. For purpose of this will, my "works of art" and "artwork" shall include, but shall not be limited to, my paintings, sketches, drawings, sculpture, etchings, etching plates, manuscripts, journals and other writings together with all economic rights associated therewith.

All of the rest, residue and remainder of my estate, real and personal, of every nature and description and wherever located, including all of my works of art not bequeathed in Article FIRST above, not intending hereby to exercise any power of appointment that I may have at the time of my death, which I hereby expressly

decline to exercise, I give, devise and bequeath to my said wife, PEGGY ROGGENBUCK GILLESPIE, ROBIN FREEDENFELD and PHYLLIS KORNFELD in their capacity as Trustee under a certain instrument of revocable trust executed by me this day just prior to the execution of this will and entitled "GREGORY GILLESPIE REVOCABLE TRUST" or, if said Trustee is not then serving as such, to the person, persons and entity then so serving to be added to the property, if any, then held in trust by said Trustee and to be held and administered in accordance with the terms of trust stated in said instrument of revocable trust as from time to time amended. If for any reason a court of competent jurisdiction shall declare this testamentary transfer to the Trustee of said revocable trust to be invalid, I declare that the [**p. 4] said property shall be held, managed, invested and reinvested by said Trustee as a trust fund in exactly the same manner described in said instrument of revocable trust giving effect to all amendments of said trust if it shall be legal to do so, but in any event giving effect to the provisions of said instrument as they now exist and by the same Trustee, and for that purpose I do hereby incorporate the said instrument of revocable trust by reference into this, my will.

FOURTH: I intentionally make no further provision in this, my will, for any child of mine or for any issue of any deceased children whether now or hereafter born.

FIFTH: I direct my executrix to pay out of that part of my residuary estate allocated to the residuary trust under said GREGORY GILLESPIE REVOCABLE TRUST all death, succession, transfer, estate and inheritance taxes payable by reason of my death on account of any property whether passing under this will or not, but not including any taxes imposed by reason of my death by Chapter 13 of the Internal Revenue Code of 1986, as amended. I authorize my executrix to settle and compromise, as soon as convenient after my death, any of such taxes. If

said portion of my residuary estate allocated to said residuary trust is insufficient to fully pay said taxes, no property included in the marital deduction in my estate for Federal and state Estate Tax purposes shall be used to pay or contribute to the payment of any such taxes. If there shall be included in my estate for tax purposes any property other than in [**p. 5] said GREGORY GILLESPIE REVOCABLE TRUST over which I have a power of appointment, whether or not exercised or released by me, my executrix shall seek to recover from the recipient of said property at least such portion of any increase in taxes on account of the inclusion of such property as the law may provide. Notwithstanding the foregoing, I direct that United States Treasury bonds redeemable at par plus accrued interest in payment of the Federal Estate Tax held in said trust at the time of my death that become assets of my estate may be used for payment of the Federal Estate Tax payable on account of my death to the extent that the amount of such bonds so redeemable in my residuary estate prior to the addition of any such bonds from said trust shall be inadequate to pay the full amount of such taxes. Expense deductions of my estate may be taken in calculating the Federal and state Estate Tax or the Federal Income Taxes of my estate at the discretion of my executrix; elections by my executrix with regard to such deductions, shall be binding on all persons interested hereunder and shall not result in adjustment of income or principal accounts with respect to my estate. My executrix may join with my wife in filing joint gift and income tax returns without actual gift from or receipt of income by my estate, and without making compensating adjustments, and may consent to treating for Federal Gift Tax purposes half of any gift made by my said wife as made by me, despite any resulting additional liability to my estate.

[**p. 6] I authorize my executrix to make valuation elections for purposes of any state estate or inheritance taxes and the Federal Estate Tax, and in the sole discretion of such executrix, to determine

whether to elect to qualify any portion of Trust B under Clause VB of said GREGORY GILLESPIE REVOCABLE TRUST or any other property in my gross estate for Federal Estate Tax purposes or state estate tax purposes as qualified terminable interest property under Section 2056(b)(7) of the Internal Revenue Code of 1986, as amended, or similar provisions of any state estate tax law. Such determination as to the election to qualify any portion of Trust B or any other property as qualified terminable interest property shall be conclusive and binding upon all affected persons, whether or not in being, and my executrix shall not be liable for any such determination made in good faith. While I generally expect my executrix to seek to minimize the Federal Estate Tax payable with respect to my estate, I also expect that consideration will be given to the Federal Estate Tax payable with respect to the estate of my wife upon her death. I further authorize my executrix to make such other elections for tax purposes as such executrix shall deem proper, without regard to the tax effect of any such election on the recipient of any property.

SIXTH: I request that, to the extent permitted by law, the representation of the interests of minors and persons unborn and unascertainable who may be interested under [**p. 7] this will or under said GREGORY GILLESPIE REVOCABLE TRUST shall be dispensed with.

SEVENTH: I appoint my wife, PEGGY ROGGENBUCK GILLESPIE, as guardian of the person and property of my minor children. If my said wife shall not survive me or shall be unable or shall cease to serve as such guardian, I hereby appoint PHYLLIS KORNFELD, of Hatfield, Massachusetts, as guardian of the person and property of any such children. If the said PHYLLIS KORNFELD shall not survive me or shall be unable or shall cease to serve as such guardian, I hereby appoint ROBERT E. RECHTSCHAFFEN and his wife, VIRGINIA R. ACKERMAN, of Belchertown, Massachusetts, or the survivor of them or such of them as is willing and able to so

serve, as guardian of the person and property of any such children.

EIGHTH: I hereby name my wife, PEGGY ROGGENBUCK GILLESPIE, to be executrix of this, my will, or if she is unwilling or unable or ceases to serve as such, I name WILLIAM E. HART, of Amherst, Massachusetts, to act as executor. I request that my nominee for executrix be appointed as temporary executrix until appointment as executrix hereunder or the appointment of any administrator or administrators with this will annexed.

No bond shall be required of my executrix, whether or not temporary, or of any guardian hereunder, or, if a bond is required by law, no surety shall be required on such bond.

[**p. 8] I hereby authorize my executrix, without license of any court, to retain in and as a part of my estate, for so long as may be deemed advisable, any of the property, real or personal, at any time comprising part of my estate and to sell, mortgage, pledge, manage, invest and reinvest any or all of such property at any time prior to the allowance of such fiduciary's final account.

NINTH: If my executrix deems it advisable to sell any of my works of art such sales shall be made in consultation with the Trustee of the said GREGORY GILLESPIE REVOCABLE TRUST (and if my daughter JULIANNA MAY GILLESPIE should die without leaving issue who survive her by thirty (30) days during the administration of my estate then also in consultation with the Trustees of the Gregory Gillespie Foundation) so that an orderly program of sales may be established. During the course of my career and to this date I have employed Miss Bella Fishko as my sales agent, and she has displayed my works of art at her gallery known as the "Forum Gallery," presently located at 1018 Madison Avenue, New York, New York. My executrix may or may not continue to use the services of Miss Fishko and the Forum Gallery. The program of sales shall be in accordance with the following guidelines:

A. It is my primary intention that my works of art be sold to institutions or individuals that will permit the widest possible audience to view my works after their sale. Accordingly, my executrix shall endeavor to sell my works [**p. 9] of art to museums, universities and other charitable organizations that will be able to place my works of art on public display. My executrix may also make sales to private collections, and, in her discretion, my executrix may require certain commitments of public display as part of the negotiations for the sale of any of my works of art.

B. It is also my intention that the sale of my works of art shall be made on a timely basis in light of public acceptance of, appreciation of, and demand for my works of art so as to maximize the sales price for each work of art sold. I understand that demand for my works of art may fluctuate, and, accordingly, I request that my executrix participate with the aforementioned Trustees to establish a flexible program of sales, recognizing that there may be a need to spread sales over a considerable period of time.

TENTH: All references herein to Federal Estate Tax, Federal Income Tax and Federal Gift Tax are to the Estate, Income and Gift Taxes, respectively, under the Internal Revenue Code of 1986, as amended and in force at the time of my death. Where necessary for the proper meaning to be given to the terms used herein, words denoting one gender include the other genders, the singular includes the plural and the plural includes the singular. As used herein the word "issue" shall not include illegitimate children in any generation or their issue, but an adopted child in any generation and his issue shall be treated as the natural child and issue of the adopting parent. References [**p. 10] herein to "executrix" or "executor" shall denote and include any administrator with this will annexed.

IN WITNESS WHEREOF, I have hereunto set my hand on this Nov 17, 1988.

s/Gregory Gillespie
GREGORY GILLESPIE

Signed, published and declared by the Testator, GREGORY GILLESPIE, as and for his last will and testament, in the presence of us, who in his presence, at his request and in the presence of each other, have hereto subscribed our names as witnesses, and it is the opinion of each of us that said Testator is of full age and of sound mind.

s/Karen Swenson — 165 Buckingham St.
Springfield, MA 01109

s/Kerry Sue Healey — 19 Clinton Street
Ware, MA 01082

COMMONWEALTH OF MASSACHUSETTS
Hampshire, ss.

Before me, the undersigned authority, on this day personally appeared the testator and the witnesses whose names are signed to the attached or foregoing instrument, and, all of these persons being by me duly sworn, the testator declared to me and to the witnesses in my presence that the instrument is his last will and that he had willingly signed or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence of the testator, that she signed the will as [**p. 11] witness and that to the best of her knowledge the testator was eighteen years of age or over, of sound mind and under, no constraint or undue influence.

s/Gregory Gillespie

s/Karen Swenson

s/Kerry Sue Healey

Subscribed and sworn to before me by the said testator and the said witnesses, this 17th day of November, 1988.

s/William E. Hart
Notary Public

My commission expires: July 10, 1992

FIRST CODICIL TO LAST WILL AND TESTAMENT OF GREGORY GILLESPIE

I, GREGORY GILLESPIE, of Belchertown, Hampshire County, Massachusetts, declare this instrument to be the first codicil to my last will and testament, dated November 17, 1988.

1. I hereby amend said will by deleting the second sentence of the first paragraph of Article FIRST thereof and by deleting the phrase "with a separate order so determined for the second, third, fourth and fifth works of art to be chosen by my said children" from the second sentence of the third paragraph of said Article FIRST.

2. I hereby amend said will by deleting the name "PHYLLIS KORNFELD" from the second paragraph of Article THIRD and replacing such name with the name "VIRGINIA KAESER."

3. I hereby amend said will by deleting Article SEVENTH in its entirety and substituting the following in its place and stead:

"SEVENTH: I appoint my wife, PEGGY ROGGENBUCK GILLESPIE, as guardian of the person and property of my minor children. If my wife is unable or unwilling or ceases to serve as such guardian, I appoint my friend VIRGINIA KAESER, of Amherst, Massachusetts, as guardian of the person and property of any such children. If the said VIRGINIA KAESER shall be unwilling or unable or ceases to act as such guardian, her [**p. 2] husband, JAMES MARINISS, shall act as such guardian."

4. Save as amended hereby, I ratify, confirm and republish said will.

IN WITNESS WHEREOF, I have hereunto set my hand on this Feb 25, 1992.

s/Gregory Gillespie
Gregory Gillespie

Signed, published and declared by the Testator, GREGORY GILLESPIE as the first codicil to his last will and testament, dated November 17, 1988, in the presence of us, who in his presence, at his request and in the presence of each other, have hereto subscribed our names as witnesses, and it is the opinion of each of us that said Testator is of full age and of sound mind.

s/MaryAnn Grim — 65 Alpine Drive, Amherst, MA 01002

s/Donna Gingras — 132 Elm Street, Hatfield, MA 01038

COMMONWEALTH OF MASSACHUSETTS
Hampshire, ss.

Before me, the undersigned authority, on this day personally appeared the testator and the witnesses whose names are signed to the attached or foregoing instrument, and, all of these persons being by me duly sworn, the testator declared to me and to the witnesses in my presence that the instrument is the first codicil to his last will and that he had willingly signed or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence of the testator, that he or she signed the codicil as witness and that to the best of his or her knowledge the testator was eighteen years of age or over, of sound mind and under no constraint or undue influence.

s/Gregory Gillespie

s/MaryAnn Grim

s/Donna Gingras

Subscribed and sworn to before me by the said testator and the said witnesses, this 25th day of February, 1992.

s/William E. Hart
Notary Public
My commission expires: July 10, 1992

APPENDIX F

Letter from Adam Weinberg,
Director of the Whitney Museum, NYC
(A2-273)

WHITNEY

Adam D. Weinberg
Alice Pratt Brown
Director

Whitney Museum of American Art
945 Madison Avenue at 75th Street
New York, NY 10021
www.whitney.org
Tel. (212) 570-3635
Fax (212) 535-6186

October 31, 2003

Mr. Vincent Gillespie
P.O. Box 741
Northampton, MA 01061

Dear Vincent,

This letter is in response to your inquiry regarding the estate of your father Gregory Gillespie. As you know, the Whitney has the very best regard for Gregory's work. The Whitney, the Museum of record for 20th Century American art, has in its collection, 3 pieces of his work, which have been included in many group exhibitions since 1965.

I am, needless to say, very hesitant to enter any dispute regarding Gregory Gillespie's estate, but as per your request I can say that to my knowledge and to that of our Curator of Contemporary, Lawrence Rinder, his work has not been affected by his Estate for sale or as a donation to the Museum. We of course would be interested in acquiring a key work, especially if it were to be offered as a donation to the Museum. It is always of benefit for an artist of note to have his work accessible to scholars and the community in permanent collections.

I hope this information is what you are seeking.

Yours sincerely,

s/_____

APPENDIX G

Letter from Malcolm Rogers,
Director of the Museum Of Fine Arts, Boston
(A2-719)

Museum Of Fine Arts, Boston
465 Huntington Avenue
Boston, Massachusetts
mfa [logo] 02115-5519

Facsimile Cover Sheet

Date: 24 October 2003

Number of pages including cover sheet: 1

To: **Vincent Gillespie**
Fax: 413 585 5135

From: Malcolm Rogers -
Ann and Graham Gund Director
Department: Director's Office
Phone: 617-369-3161
Fax: 617-369-3064

Mr. Vincent Gillespie
PO Box 741
Northampton, MA 01061

Dear Vincent:

Thank you for your recent enquiry. I am writing to confirm that, to the best of my knowledge, the Museum of Fine Arts, Boston, has not been contacted by the trustees of your late father's estate in connection with the disposition of the paintings in the estate. We would like very much to hear from them.

As I am sure you know, your late father was a distinguished and well known artist, and it is

undoubtedly the case that, were works by him to enter public collections, they would be greatly appreciated, and that their display would be very much for the public benefit.

I can also confirm that, although the Museum of Fine Arts does already hold examples of your father's work, we would certainly like to add to the depth of our holdings, so that we can do full justice to the range of the work of this distinguished New England artist.

APPENDIX H

Excerpt of transcript from the
Forum Gallery vs. Peggy Gillespie, et al. case
(A1-273)

Excerpt of transcript from the
Forum Gallery vs. Peggy Gillespie, et al. lawsuit:

THE COURT: Let's focus on the time period after he died.

It just seems to me that the record is replete with acknowledgment and lack of dispute about the existing debt. I mean, if we start with Exhibit C to Ms. Gillespie's affidavit, we have a document prepared by the estate's counsel, which in paragraph 4 acknowledges that, "30 percent of the gross sales price of the decedent's works of art shall be paid to the gallery to reduce the decedent's arrearage in advances existing at his date of death, which at that time was $300,072.44."

That is in the language of the estate's own lawyer. No one put it in the lawyer's mouth.

You then go on. Turning to Mr. Fishko's affidavit, we have Exhibit 13, dated July 27, 2000. And I am not sure if that is accurately dated or not. I mean, I don't know if that's meant to be April 27th. In any event, it is apparently sent and recites the $300,000 balance due. It is not objected to. You don't claim anyplace that it was objected to.

We go on to Exhibit 14, which is the consignment agreement, which says that half of the 60 percent that the estate gets shall be used "to pay off the advanced balance to the Forum Gallery."

This again is a document prepared by Ms. Gillespie, not prepared by the Forum.

We then have Exhibit 15, which reflects the sending of a check in the amount of $32,400 on August 30, 2000, which is cashed and cashed in relationship to a document which says that the other 50 percent of the net proceeds are to be used to reduce the debt to Forum Gallery.

We then again on December 10th have a similar document, again not objected to, with the check again cashed.

I mean, it seems to me that there is a record here in which the estate has acknowledged time and time again, and without anyone holding a gun to their head, that this is a preexisting debt that they are obligated to pay.

MS. MATHER: Your Honor, I disagree with that, and I will try to tell you why.

Looking over those documents, there's only two of those documents that actually come from the estate that you mentioned –

THE COURT: You know the concept of acts stated, that when a document is sent to you, if you object to it you have an obligation to object and not to cash the check? Did you cash the check under protest? Did you reserve any rights when you took the money?

MS. MATHER: Well, your Honor, given all the other correspondence and all the other conversations that occurred between the parties, it certainly wouldn't seem in equity or good conscience that in fact the estate would be personally liable based on the fact that there is a portion of an account statement that says to reduce debt to Forum Gallery, including a check, that Ms. Gillespie at that time would have–

THE COURT: She was awarded throughout this entire period. This is not a situation in which you have an unrepresented grieving widow who because of an emotional situation was incapable of protecting herself. I mean, what you are suggesting, it is not a good overreaching argument here, I don't think.

(Emphasis added.)
(Forum Gallery vs. Peggy Gillespie, et al. transcript of 2/26/02 hearing, p. 17, line 15 through p. 19, line 23.)
(A1-273.)

APPENDIX I

M.G.L. chapter 230 § 5:

GENERAL LAWS OF MASSACHUSETTS

PART III.
COURTS, JUDICIAL OFFICERS, AND PROCEEDINGS IN CIVIL CASES

TITLE II.
ACTIONS AND PROCEEDINGS THEREIN

CHAPTER 230. ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS

Chapter 230: Section 5. Refusal to enforce claim; action by heir, legatee or creditor

"Section 5. It shall be unnecessary to remove an executor or administrator in order that an action to enforce a claim in favor of the estate may be brought by an administrator to be appointed in his place, when he refuses to bring such action at the request of an heir, legatee or creditor, or is unable to do so by reason of his interest or otherwise, but an heir, legatee or creditor having an interest in the enforcement of any such claim may bring a civil action to enforce it for the benefit of the estate in like circumstances and in like manner as a person beneficially interested in a trust fund may bring an action to enforce a claim in favor of such fund, and in case of such action in respect to real estate, it shall not be an obstacle to the action that a license to sell it has not been obtained by the executor or administrator."

APPENDIX J

M.G.L. chapter 215 § 11:

GENERAL LAWS OF MASSACHUSETTS

PART III.
COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

TITLE I.
COURTS AND JUDICIAL OFFICERS

CHAPTER 215. PROBATE COURTS

APPEALS

Chapter 215: Section 11. Report of facts

"Section 11. In cases not governed by the Massachusetts Rules of Civil Procedure or comparable rules for domestic relations matters, the judge by whom an order, judgment, decree or denial was made shall report the material facts found by him, on request of any party entitled to appeal therefrom made within ten days after such party has notice of such order, judgment, decree or denial; otherwise such report shall be in the discretion of the judge."

APPENDIX K

M.G.L. chapter 68 § 18:

PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE XI. CERTAIN RELIGIOUS AND CHARITABLE MATTERS

CHAPTER 68. DONATIONS AND CONVEYANCES FOR PIOUS AND CHARITABLE USES

Chapter 68: Section 18. Definitions

"Section 18. When used in this section, and in sections nineteen to thirty-five, inclusive, the following terms shall have the following meanings:—

" 'Charitable', including but not limited to benevolent, educational, philanthropic, humane, patriotic, scientific, literary, religious, eleemosynary, health, safety or welfare-related, or in furtherance of governmental or civic objectives, and benefiting the general public or some indefinite class thereof;"

APPENDIX L

Massachusetts Constitution, Part 1, Article XI:

"Article XI. Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

APPENDIX M

U.S. Constitution, 14th Amendment (Section 1):

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor *deny to any person within its jurisdiction the equal protection of the laws.*"

APPENDIX N

American Jurisprudence, second edition,
volume 15, section 118:

"**§ 118 Generally; charities as favorites of the law**

"Gifts or trusts for charitable purposes are favorites of the law and the courts. It is the fixed policy of the law to uphold charitable gifts and trusts whenever possible. That is, gifts or trusts, whether inter vivos or testamentary, for purposes which the law recognizes as charitable, are regarded with *special favor*, once the charitable purpose becomes evident, and will not be declared void if they can, by any possibility consistent with law, be upheld. **Courts of equity, it is said, will go to the length of their judicial power to sustain such gifts.** *Provisions for such gifts are construed so as to give them effect, if possible, and to carry out the general intention of the donor when clearly manifested, even if the particular form and manner pointed out by him cannot be followed.* When called upon to construe private humanitarianism, courts do not adopt an antagonistic spirit toward a donor's charitable intent, and **it is the rule that where doubt exists, a gift must be interpreted in favor of a charity.** Where they cannot be followed literally, the courts usually apply the cy pres or a similar doctrine. It is manifest from the above principles that gifts for charitable purposes are upheld under some circumstances where a private gift might fail."

(All emphasis except in the title line has been added.)

APPENDIX O

Massachusetts Rules Of Civil Procedure, Rule 60(b):

RULE 60.
RELIEF FROM JUDGMENT OR ORDER

"(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of review, of error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

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(2)

No. 06-1177

FILED
APR 25 2007
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SUPREME COURT, U.S.

In The

Supreme Court Of The United States

Vincent Gillespie,
Petitioner,
v.
Peggy Roggenbuck Gillespie,
Respondent

On Petition For Writ Of Certiorari
To The Massachusetts Court Of Appeals

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Vincent Gillespie
Petitioner In Pro Per
P. O. Box 741
Northampton, MA 01061
413-527-5728

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III) INTRODUCTION:

The Doctrine Of Cy Pres was briefly mentioned in the Petitioner's Petition For Writ Of Certiorari ("Petr.") (p. 17, and Ap.N-103[1]). This Supplemental Brief provides some additional authorities and information regarding the Doctrine Of Cy Pres and how it is applicable to the instant case. The Doctrine Of Equitable Deviation and its applicability to this case is also discussed.

IV) DISCUSSION:

A) Background: Peggy in her role as executrix is thwarting Greg's charitable intention of having his paintings placed in museums:

Greg stipulated in his will that Peggy Roggenbuck Gillespie ("Peggy"), his widow, should be the executrix. During her relationship with Greg while he was alive, Peggy abused him, exploited him, showed great contempt for his interests and she manipulated him, often in ways that he did not fully understand. (See Petr., p. 10, fn # 12).[2] Peggy's refusal to place Greg's paintings into museums, while trying to rapidly sell as many paintings as possible,[3] despite her

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[1] See the Abbreviations Key in the Petr., p. iii, footnote 1.

[2] In 2003 both the petitioner and his attorney (Tom Kenefick) submitted materials to the Charitable Division of the Massachusetts Attorney General's Office in an effort to have them become involved in this case. Ms. Johanna Soris of that office, after reviewing these materials, which discussed, among other things, Peggy's abusive and manipulative conduct towards Greg, wrote that: "...this case involves a very dysfunctional family situation which is also very ambiguous." (A2-744.)

[3] Peggy has had at least six shows in which she has endeavored to sell Greg's work since she was made executrix in July of 2000. She had one at the Forum Gallery in NYC, three at the Nielsen Gallery in Boston, and two at the Salander-O'Reilly Gallery in NYC. All the while she has [Footnote continued on next page ...]

having acknowledged that it was a lifelong desire of Greg's to have his paintings placed in museums (MCA.Reply.Br-17; A1-233-234, par. 12), reflects a continuation after his death of her exploitation and abuse of him during his life.

Peggy, in her role as executrix, is entirely incapable of fulfilling Greg's primary intention of having his paintings placed in museums. As mentioned in the Petr., Peggy has repeatedly insisted that she has no obligation at all to place Greg's paintings in museums and her lack of effort in this area is reflected in the fact that during the entire time she has been executrix only two small paintings have been placed in museums.[4] (Petr., pp. 9-10.) As also mentioned in the Petr., Peggy has a conflict of interest because placing paintings in museums generally requires sales prices to be reduced or for paintings to be donated, but any reduction in prices would reduce Peggy's profits. (Petr., p. 10.) The fact that, prior to the start of this litigation she held shows of Greg's work at the Forum Gallery and the Neilsen Gallery without even informing these dealers about the terms of Greg's will indicating that paintings were to be placed in museums (Petr., pp. 9-10; MCA.Op.Br-11-12[5]; A1-68; A1-140-141) shows that Peggy had no intention at all of trying to place Greg's work in museums, it was not even on her radar screen. (How could the dealers have even attempted to try to make any special effort to place Greg's paintings in museums if they did not even know they were supposed to do so?) Furthermore, it should also be considered that placing paintings in museums can be an involved matter, requiring

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for the most part refused to make any real effort to place paintings in museums.

[4] Even those two museums sales appear to have occurred through the normal course of events rather than through any special effort by Peggy to place paintings in museums.

[5] Footnote 10 on p. 12 of our Opening Brief to the Massachusetts Court of Appeals is missing some of its references. Please refer to the Errata Sheet for that document as necessary.

substantial time and effort. Robert Fishko, in his deposition, stated that it involves "... a major effort on the part of the artist's representative..." (See Ap.P-12.)

Given all of these facts, it is apparent that as long as Peggy is the executrix there is basically a snowball's chance in hell of any significant portion of Greg's paintings getting into museums. Peggy is very capable of implementing the clause in the will about maximizing prices, since that directly profits her, but she has clearly shown herself to be completely incapable of implementing what Greg identified as his primary intention and what the Mass. Court of Appeals implicitly acknowledged was a charitable purpose (Petr., p. 15, par. 1), Greg's longstanding and deep desire to have his paintings placed in museums. Thus the stipulation that Peggy should be the executrix is a clause in the will which thwarts and makes it impossible to implement the charitable purpose of placing Greg's paintings in museums.[6]

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[6] It might be argued that since the will stipulates that sales prices of the paintings should be maximized (Petr., p. 9) this ties Peggy's hands and would limit her ability to place paintings in museums even if she really wanted to (since placing paintings in museums frequently requires reducing prices or donating paintings). Two things in response:

First, even without reducing prices there is much more that Peggy could do to endeavor to get paintings into museums. It is obvious that Peggy has done very little in this regard and her repeated insistence that she has no obligation to place paintings in museums and other things she had done, as discussed above (pp. 1-3), lead to the conclusion that another executor who really wanted to place paintings in museums could do much more than her in this regard.

Second, the Doctrine Of Cy Pres and the Doctrine Of Equitable Deviation (both discussed below) both allow for overriding portions of a trust which thwart a charitable purpose. Thus, if this court did choose to apply one of these doctrines to the instant case for the purpose of removing the executrix, as the petitioner advocates in this Supplemental Brief, then the court could additionally use the same doctrine to override this clause in the will (requiring that prices be maximized) and allow pricing flexibility regarding sales to museums.

So what we have here is a situation in which the will includes a clause (making Peggy the executrix) which make it *impossible* to carry out the wishes, the explicitly stated charitable intent, of the testator. This is a situation which is ripe for the application of the Doctrine Of Cy Pres or, alternatively, the Doctrine Of Equitable Deviation. These two doctrines enable a court to override portions of a trust if necessary to fulfill a charitable purpose. Thus if either of these doctrines were applicable to the instant case they would enable the court to take action by authorizing the overriding of portions of the will to facilitate the charitable purpose of having Greg's paintings placed in museums.

B) The doctrine of cy pres:

The Doctrine Of Cy Pres is described in American Jurisprudence as follows:

> "In the exercise of its equitable jurisdiction a court may control the administration of a charitable trust so as to effectuate its avowed purposes, particularly when changing circumstances would otherwise defeat them. *Courts will ordinarily permit deviation from the terms of a charitable trust where compliance is illegal, impracticable, or impossible,* or where, owing to circumstances not known to the settler, literal compliance will defeat or substantially impair the accomplishment of the purposes of the trust. Depending upon the circumstances and the reason for deviation, the court may do this under the doctrine of cy pres, or under the doctrine of equitable deviation, which is applicable to all trusts, private or charitable. ..."[7]

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[7] All footnotes included in all quotations from American Jurisprudence have been omitted in this brief. Note that this also applies [Footnote continued on next page ...]

(Emphasis added.)
(15 Am.Jur.2d, § 148.)

> "The doctrine of cy pres is a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor when the intent cannot be effectuated to the letter of the donor's directions or specifications. The doctrine of cy pres assumes that a valid charitable trust has been created and will not be applied to save a trust which is not a valid charitable one."
>
> (15 Am.Jur.2d, § 149.)

So the question is whether or not the Doctrine Of Cy Pres is applicable to the instant case. American Jurisprudence lists three characteristics which need to be present for cy pres to be applicable:

> "... cy pres is applicable in situations where (1) property is given in trust for a particular charitable purpose; (2) it is, or becomes, impossible, impracticable, or illegal to carry out such purpose; and (3) the settler manifested a more general intention to devote the property to charitable purposes."
>
> (15 Am.Jur.2d, § 149.)

The first of these three characteristics, a particular charitable purpose (as opposed to a larger, more general charitable intention), has been met with Greg's stated "primary intention" of maximizing the viewing audience of his paintings (i.e., placing his paintings into museums). As

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to the Petr., although the petitioner forgot to mention this fact in that brief.

noted in the Petr., the Massachusetts Appeals Court implicitly acknowledged that this intention was charitable (Petr., p. 15, par. 1). As also noted in the Petr. (p. 17), "[a] trust for the support of an art or other public museum is also a valid charitable purpose..." (15 Am.Jur.2d, §50). So we have a particular charitable purpose.

The second characteristic listed by American Jurisprudence is that "...it is, or becomes, impossible ... to carry out such [charitable] purpose..." This characteristic is also present in the instant case. As discussed above on pp. 1-4, The charitable purpose of placing paintings in museums is being thwarted by the clause in the will which made Peggy the executrix.

The third characteristic listed by American Jurisprudence is that "...the settler [must have] manifested a more general intention to devote the property to charitable purposes..." (in addition to the particular, specific charitable purpose which the Doctrine Of Cy Pres is being employed to protect). Greg's overall, general and primary intention was to maximize the viewing audience of the paintings after their sales. As discussed below, this is a charitable purpose.

The Respondent has argued, however, that the additional aim of maximizing the sales prices of the paintings and the fact that Peggy (and Julianna) are the primary trust beneficiaries cause the will and trust to not be charitable. However, in his Motion For Reconsideration to the Probate Court the petitioner provided evidence, affidavits, showing that Greg wanted to maximize his prices for the purpose of maintaining the *prestige* of the paintings, an objective which is entirely consistent with his desire to have the public view and appreciate his work as much as possible. The affidavits also confirmed that Greg's overriding and primary intention was to maximize the viewing audience of his works after their sales, to have them placed in museums where they would be seen and appreciated by many people, and not to benefit Peggy and Jay. (See the Petr., pp. 18-19.)

Note that for a summary judgment motion the trial court and the reviewing court must assume that these affidavits and all other well pled facts in the petitioner's briefs are true. In Graham V. Quincy Food Serv. Emp. Ass'n & Hosp., Lib., 407 Mass. 601 (1990), 555 N.E.2d 543 the Massachusetts Supreme Court stated the following about the reviewing standard regarding a grant of summary judgment:

> "Generally, in reviewing a grant of summary judgment, we view the facts in the light most favorable to the party opposing summary judgment. *Alioto* v. *Marnell,* 402 Mass. 36, 37 (1988). **Thus, we assume that 'all of the facts set forth in the [opposing party's] affidavits [are] true. ...'** *Coveney* v. *President & Trustees of the College of the Holy Cross,* 388 Mass. 16, 17 (1983). When the court below grants summary judgment for the nonmoving party, we invert the usual standard and 'view the record in the light most flattering to ... the summary judgment loser,' here, the plaintiff. *Quaker State Oil Refining Corp.* v. *Garrity Oil Co.,* 884 F.2d 1510, 1513 (1st Cir. 1989)."
>
> (Emphasis Added.)
> (Graham V. Quincy Food Serv. Emp. Ass'n & Hosp., Lib., 407 Mass. 601 at 603.)

(See also additional case citations pertaining to the standard of review for a grant of summary judgment in the Petr., p. 30, fn 30.) Thus, for the purposes of this petition, it must be assumed that Greg wanted the sales prices of his paintings to be maximized for the purpose of furthering his primary objective, which was to maximize the viewing audience of his paintings after their sales (this is what the affidavits in the Motion For Reconsideration say). Thus, it should be

assumed (at least for the purposes of this petition) that the overriding, primary and general intention of the will was a charitable one (despite the fact that Peggy and Julianna benefit from the proceeds of the sales).

To the extent that there is ambiguity regarding this point, the very powerful language from American Jurisprudence cited in the Petr. (pp. 16-17), as well as the factual reasons set out on p. 16 of the Petr., guide and empower the court to interpret the trust in favor of a charitable purpose.

Thus, we have established that the overall, general intent of the will and trust are charitable, and so the Doctrine Of Cy Pres can be used to remove the executrix and replace her with someone who will endeavor to place the paintings in museums.

C) The doctrine of equitable deviation:

If this court should disagree with the above arguments asserting that Greg's overall, primary and general intention was charitable, then this court might conclude that the Doctrine Of Cy Pres is inapplicable. Even if we assume, just for the sake of argument, that the overall, primary and general intention of the will and trust is not charitable, we still have the decision of the Massachusetts Court of Appeals, which implicitly acknowledged that Greg's intention of maximizing the viewing audience of his paintings after their sales *was* charitable (although it also held that the will as a whole was not charitable) (Petr., p. 15, par. 1). If we assume, for the sake of argument, that the Massachusetts Court of Appeals's decision is correct on this point then what we have is that Greg's particular (or limited) intent of placing paintings in museums is charitable while his general (if we assume this were correct, although we could not apply the Doctrine of Cy Pres we could nonetheless apply the Doctrine Of Equitable Deviation.

American Jurisprudence says the following about the Doctrine Of Equitable Deviation:

> "A key difference between [the doctrine of cy pres and the doctrine of equitable deviation] is that which concerns the underlying charitable intent necessary before the doctrines may be applied to a charitable trust. For the cy pres doctrine to apply, a general charitable intent must have been manifested by the donor, but a specific, as distinguished from a general, charitable intent, suffices for the application of the doctrine of equitable deviation."
>
> (15 Am.Jur. 2d, § 149.)

> "When deviation from the administrative provision of a charitable trust is appropriate, a court may direct or permit the trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust. Equitable deviation can be distinguished from the somewhat similar doctrine of cy pres in that the equitable deviation deals only with changes in the administrative provisions of a trust, while cy pres involves an alteration of the purpose to which the res of the trust is to be applied."
>
> (15 Am.Jur. 2d, § 155.)

The two doctrines, Cy Pres and Equitable Deviation, are basically similar to each other except that: (1) the latter is limited to administrative changes while the former is not and (2) the former requires a general (or larger) charitable intent in order for that doctrine to be applicable, while a particular (more limited) charitable intent is sufficient to enable the latter doctrine to apply. (15 Am.Jur.2d § 148, 149, 155 and 156.) Let us examine the instant case to see if the Doctrine Of Equitable Deviation is applicable:

Is there sufficient charitable intent? We need only a particular charitable intention (as opposed to a larger, general one) for the Doctrine Of Equitable Deviation to be

applicable. As discussed above the Mass. Court of Appeals has implicitly acknowledged that what Greg stated was his primary intention, his desire to have his paintings placed in museums, was charitable. Thus we have a particular charitable purpose even if the overall or general intent is not charitable and that is sufficient for the application of the Doctrine Of Equitable Deviation.

The Doctrine Of Equitable Deviation is limited to administrative changes: There is the fact that, unlike the Doctrine Of Cy Pres, the Doctrine Of Equitable Deviation is limited to enabling administrative changes in a trust, as opposed to fundamental changes in the disposition of the res of the estate. The primary change being advocated by the petitioner, removal of the executrix, is surely an administrative change which falls within the purview of the Doctrine Of Equitable Deviation. Thus this limitation of the Doctrine Of Equitable Deviation does not prevent this doctrine from applying to the instant case.

Thus, even if this court agrees with the Massachusetts Court Of Appeals's holding that Greg's general (or overall) intention was not charitable but that his particular (specific, limited) intention to place paintings in museums was charitable, although this would make the Doctrine Of Cy Pres inapplicable, nonetheless the Doctrine Of Equitable Deviation would be applicable. This doctrine couild be employed in this case to facilitate the removal of the executrix who is thwarting Greg's particular charitable intention of placing Greg's paintings in museums.

V) CONCLUSION:

For all of the reasons in this Supplemental Brief as well as all of the reasons in the Petitioner's Petition For Writ Of Certiorari, this court should grant this petition.

Date: April 25th, 2007 Signed: Vincent Gillespie

Vincent Gillespie
Party in pro per

APPENDIX P

Excerpt from the deposition of Robert Fishko, Director of the Forum Gallery
(This deposition can be reviewed in its entirety in the record at A1-57-110.)

Excerpt of Deposition Of Robert Fishko

[Mr. Gillespie:] I have another question here, and this is just based on your expertise. In general, when you – often when you want to get paintings into a good museum such as the Met or the Whitney or any good museum, is a price reduction a common part of that procedure?

[Mr. Fishko:] The price can often become a part of the – part of the process that results in an acquisition by a museum, but it's never or rarely, I would say, almost never, the first step in the process. The work has to be – has to be either desired by the museum in order to get a price negotiation going, or, as is usually the case, especially these days, there has to be a major effort made on the part of the – on the part of the artist's representative to interest not just the museum, but also potential donors or other third parties who would have an interest in having the museum acquire a particular work, and making them a part of the transaction before you can even get to the question of how much the painting costs.

It's a – it's a – it's a program that has to be undertaken in order to place works in museums, and it's often much, much, much more complex than simply a question of reducing the price to make it more attractive.